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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

—
No. 540

UNITED STATES OF AMERICA, PETITIONER,

vs.

HARRY GRAY NUGENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 9, 1953

CERTIORARI GRANTED MARCH 16, 1953

SUPREME COURT OF THE UNITED STATES

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1 In United States District Court for the Southern District
of New York

UNITED STATES

vs.

HARRY GRAY NUGENT

T₃ 50 Sec. 462, U. S. Code unlawfully failed and neglected to
take one step forward under the Universal Military Training and
Service Act.

1 Count.

DOCKET ENTRIES.

PROCEEDINGS.

2/29/52—Filed indictment.

3/5/52—Pleads not guilty. Bail continued. Bail \$1,000. to be re-
newed by 4 P. M. today.—Bondy, DJ. Filed Notice of Appearance—Herman Adlerstein, 79 Wall Street, N. Y. City Attorney.
Filed Recognizance dated 3/5/52—\$1,000. National Surety Corp.,
Surety.

4/21/52—Trial begun and concluded before Judge Edward Wein-
feld. Jury Waived. Court finds defendant "guilty"

4/21/52—Filed Judgment—Two and one-half years at a place
of confinement to be designated by the Attorney General. Re-
manded—Weinfeld, J.

4/21/52—Issued Commitment and copies

4/25/52—Filed Notice of Appeal

4/30/52—Filed election not to commence service of sentence
4/29/52.

2 In United States District Court

[Title omitted]

INDICTMENT.—Filed February 29, 1952

The Grand Jury charges:

1. On or about the 21st day of February, 1952, at the Southern
District of New York, Harry Gray Nugent, the defendant did un-
lawfully, wilfully and knowingly fail and neglect to perform a duty
required of him under and in execution of the Universal Military
Training & Service Act, and the Rules and Regulations duly made
pursuant thereto, in that at the time and place aforesaid, the
defendant did fail and neglect to take one step forward, after it

had been determined that the defendant was fully qualified for induction, and which would have constituted the defendant's induction into the armed forces of the United States (Title 50, Appendix, Section 462, United States Code).

WILLIAM R. WHITE
Foreman

MYLES J. LANE
U. S. Attorney

PLEA OF NOT GUILTY

March 5, 1952—Defendant pleads not guilty.

3 In United States District Court

[Title omitted]

TRANSCRIPT OF PROCEEDINGS.

Before: HON. EDWARD WEINFELD, *District Judge*.

New York,

April 21, 1952,

10:30 o'clock a. m.

APPEARANCES:

MYLES J. LANE, Esq., United States Attorney, for the Government; by LOUIS GROSSMAN, Esq., Assistant United States Attorney.

HERMAN ADLERSTEIN, Esq., Attorney for Defendant.

Mr. GROSSMAN: At the outset, your Honor, I would like to state, after consulting with defendant's counsel, that they have agreed, defendant and his counsel have agreed to waive a jury trial. Accordingly, I have prepared a stipulation which they have just signed, and the Government has signed as well.

I would like your Honor to approve the same and advise the defendant of his rights in open court.

The Court: Who is the defendant?

(The defendant stood up.)

4 The Court: Are you Harry G. Nugent?

The Defendant: I am, your Honor.

The Court: Did you sign this waiver of trial by jury?

The Defendant: I did.

The Court: Do you understand that it is your absolute right to have the trial upon the indictment by a jury of twelve?

The Defendant: I do.

The Court: You waive your right to a trial by jury?

The Defendant: I do.

The COURT: You do so freely and voluntarily?

The DEFENDANT: I waive it voluntarily.

The COURT: Has anybody made any promises to you?

The DEFENDANT: No promises were made.

The COURT: Were any inducements or offers made to you to waive trial by jury?

The DEFENDANT: No, none whatever.

The COURT: It is your preference that you be tried by the Court without a jury instead of by a jury of twelve?

The DEFENDANT: That is right.

The COURT: I will approve it.

(OFFERS IN EVIDENCE)

Mr. GROSSMAN: If the Court please, I now offer the stipulation of the waiver of the jury as Government's Exhibit 1.

(Marked Government's Exhibit 1.)

Mr. GROSSMAN: If the Court please, I have also agreed and stipulated with Mr. Adlerstein, and we would like the same now to be contained in the record, that the defendant now on trial, namely, Harry Gray Nugent, is the same person named in the indictment, and that the cover sheet which I now offer of the Selective Service System contains all of the papers in this man's file, and that the papers are accurate, and that there is no objection to that being received in evidence at this time.

Mr. ADLERSTEIN: That is consented to. There is no objection.

5 Mr. GROSSMAN: I now offer this cover sheet as Government's Exhibit No. 2. I will subsequently offer the separate papers which I deem important and relevant as subdivisions of Exhibit 2, and the defendant may on his case offer whatever papers he deems relevant to your Honor's particular attention. However, for the record, we put the whole cover sheet into evidence.

(Marked Government's Exhibit 2.)

Mr. GROSSMAN: The defendant's attorney has also stipulated with the Government that the defendant in this case, namely, Harry Gray Nugent, was duly ordered to report for induction on February 21, 1952. He did report to the induction station.

However, he refused and neglected and failed to take the one step forward which would have constituted his induction into the armed forces of the United States.

Mr. ADLERSTEIN: That is admitted.

The COURT: Was that February 21, 1952?

Mr. GROSSMAN: That is correct, Your Honor.

I would like now to offer as Government's Exhibit 2-A the Selective Service questionnaire of the registrant, which is dated February 2, 1949. This questionnaire was filled out by the registrant and signed by him. I would also like to call the Court's attention to Series 14 of the questionnaire, wherein the defendant does allege and sign his name that he is conscientiously opposed to war and that he is a conscientious objector.

I would also like particularly to call the Court's attention to the same page where the registrant made a statement regarding his classification. On that line, in defendant's own handwriting, this statement appears:

"Due to religious belief, I will only serve as a non-combatant."

And on the last page of this questionnaire which I will constantly make reference to are the minutes of action taken by the 6 local board, appeal board in the case of this registrant. The minutes are entered thereon, which shows the various steps that were gone through in classifying this man; and various appeals that were taken in his case.

(Marked Government's Exhibit 2-A.)

The COURT: Where is this SS Form 150?

Mr. GROSSMAN: That is my next exhibit, if your Honor please.

The COURT: All right.

Mr. GROSSMAN: That form is sent only to registrants that sign their names on Series 14 as conscientious objectors. It is a special form.

The COURT: He did sign his name?

Mr. GROSSMAN: Yes, and it was sent to him. That is the next exhibit.

The COURT: All right.

Mr. GROSSMAN: I now offer Government's Exhibit 2-B, SS Form 150, known as the special form for conscientious objector. It is a more detailed questionnaire concerning the basis and reasons for his conscientious objection to war, and the defendant in this case also presented certain written statements by himself, certain printed documents which are all part of this Exhibit 2-B.

Mr. ADLERSTEIN: May we have the date on that, please?

Mr. GROSSMAN: The date, I believe, is October 10, 1950, when it was received back by the board.

(Marked Government's Exhibit 2-B.)

Mr. GROSSMAN: If your Honor please, I now especially direct your attention to two of the entries on the back of the questionnaire. The first one is dated October 25, 1950, which indicates the registrant on the basis of the questionnaires received up to date, namely, his original questionnaire and this special form for conscientious

objector, that the registrant was classified 1-A by a vote of 4 to 0 by the local board.

On October 30, 1950, he was mailed Form 110, which is his notification of registration. Defendant's counsel has conceded to me that that was received by the registrant.

Mr. ADLERSTEIN: That is conceded.

Mr. GROSSMAN: I believe I said notice of registration. It is notice of classification.

I now offer as Government's Exhibit 2-C a letter dated November 4, 1950, addressed to the local board from the defendant, signed by him, Harry G. Nugent, in which he requests a personal hearing at the local board.

(Marked Government's Exhibit 2-C.)

Mr. GROSSMAN: I now offer as Government's Exhibit 2-D, SS Form No. 223, which is an order to report for an armed forces physical examination, which was sent to the registrant on January 8, 1951, ordering him to report at 39 Whitehall Street for what is known as a pre-induction physical.

On the 17th day of January, 1951, the original of this was sent to the registrant.

(Marked Government's Exhibit 2-D.)

Mr. GROSSMAN: I might also offer in connection with that, Government's Exhibit 2-E, which is dated the 17th day of January, 1951, indicating that he was acceptable. This form is known as a certificate of acceptability, and was mailed to the defendant; that he was found acceptable for induction into the armed services.

(Marked Government's Exhibit 2-E.)

Mr. GROSSMAN: I respectfully call the Court's attention to a notation on the back of his questionnaire which is dated January 29, 1951, which states that a card was sent to the registrant to appear on 2/1/51. Obviously this is in compliance with his request for a personal hearing, and that hearing was set for February 1, 1951.

In connection therewith, the board also received, and I now offer it as Exhibit 2-F, a letter dated January 26, 1951, received by the board on January 30, 1951, a letter signed by Martin C. Mitchell, Chairman, Executive Secretary of the Bible Students National Committee, which states some relevant facts that he considers concerning this defendant.

(Marked Government's Exhibit 2-F.)

The COURT: Where is that form, SS 150, is it?

Mr. GROSSMAN: The conscientious objector questionnaire (handing to the Court).

I now respectfully call the Court's attention to two notations on the back of the registrant's questionnaire. The first one is dated February 1, 1951, the date when he was called in for hearing. It is to be noted that he is classified 1-A-O, at the time, initialed by the board members by a vote of 3 to 0.

1-A-O classification is non-combatant, as your Honor knows. That is for non-combatant duty in the armed forces of the United States.

The COURT: That is on the back of what exhibit?

Mr. GROSSMAN: The back of Exhibit 2-A.

The COURT: That is the questionnaire?

Mr. GROSSMAN: That is correct, your Honor. There is a further notation dated February 5, 1951, that the Form 110 was mailed to registrant notifying him of his new classification. That was concededly received by the defendant.

Mr. ADLERSTEIN: Conceded.

Mr. GROSSMAN: I now offer Government's Exhibit 2-G, a letter dated February 14, 1951, addressed to the Local Board No. 40, and signed by the registrant, in which he states that he would like to appeal from his classification 1-A-O.

(Marked Government's Exhibit 2-G.)

Mr. GROSSMAN: I now offer Government's Exhibit 2-H, two letters, one of which was dated February 16, 1951, which is addressed to Selected Service Headquarters and signed by the Clerk of Local Board No. 40, inquiring whether the Society of Bible Students organization is a recognized organization; and the other letter is dated February 23, 1951, which is a response from Selective Service Headquarters to the local board, giving an answer to that letter, stating that it is an organization and what it has received from that organization.

I might mention, your Honor, at this time that in 1951 and thereafter there were no blanket exemptions or classifications for any organizations whatever, as there had existed at some prior time, I believe in 1945, where any member of certain organizations was classified a certain way, but there was no such process available in 1951.

The COURT: That means that each was passed on as an individual matter?

Mr. GROSSMAN: That is right.

(Marked Government's Exhibit 2-H.)

The COURT: Well, that reference to the resolution refers to the one that is already in evidence as part of the questionnaire?

Mr. GROSSMAN: That is the same.

The COURT: Attached to his special questionnaire?

MR. GROSSMAN: That is correct, your Honor. I merely put it in so the file will be complete.

I now call your Honor's attention to an entry on the back of the registrant's questionnaire which is dated March 16, 1951, and reads as follows:

10 "Appeal Board Panel No. 2 has received the record and has determined that the registrant is not eligible for classification in either a class lower than 4-E or in 4-E and has directed that the file be transmitted to the United States Attorney for the Eastern District of New York for the purpose of securing an advisory recommendation from the Department of Justice on the claim of the registrant for deferment as a conscientious objector in accordance with Section 1626.25, paragraph A4 of the Selective Service regulations," and is signed by Julia M. Boland, Clerk.

Accordingly, I now offer as Government's Exhibit 2-I, a letter dated March 16, 1951, from Appeal Board Panel No. 2, signed by the clerk, and it is addressed to Hon. Frank J. Parker, United States Attorney for the Eastern District of New York, in which Section 1626.25 of the Selective Service regulations is complied with.

I might mention, your Honor, the reason this was sent to the Eastern District of New York is that the registrant was registered in a board which was under the jurisdiction of the Eastern District. However, the offense for which he is now being tried was actually committed within the Southern District. That is the reason for this office being involved in it now.

(Marked Government's Exhibit 2-I.)

MR. GROSSMAN: I now offer as Government's Exhibit 2-J a series of papers, the first of which is the report of the hearing officer, Thomas O'Rourke Gallagher, in the case of this defendant, Harry Gray Nugent, which report concludes with the recommendation that the registrant be retained in Class 1-A-O.

Also attached to this exhibit are the minutes of the hearing which this registrant had before the hearing officer, Thomas O'Rourke Gallagher.

The top paper in this exhibit is a letter dated January 24, 1952, which is addressed to the chairman of the appeal board, and is signed by P. Oscar Smith, Special Assistant to the Attorney General, in which the Attorney General also concludes that the recommendation given by Thomas O'Rourke Gallagher is fair and makes the same recommendation to the appeal board.

I might mention, your Honor, that both the hearing officer and the Department of Justice recommendations—the hearing officer

is especially designated, and the Attorney General for the purpose of these hearings—are merely advisory to the appeal board.

After they received this lack, they again classified him and notified the local board and this case was again given a 1-A-O classification.

(Marked Government's Exhibit 2-J.)

The COURT: May I see the original questionnaire?

(Handed to the Court.)

The COURT: In his first claim for exemption under Series 14, the answer was: "Due to religious belief, I will only serve as a non-combatant."

Mr. GROSSMAN: That is right, which is the classification he subsequently was given.

The COURT: It is the classification he was placed in eventually?

Mr. GROSSMAN: That is correct, your Honor.

The COURT: SS Form No. 100—is that the one I just asked for and looked at? The original questionnaire?

Mr. GROSSMAN: That is correct; that is SS Form 100.

The COURT: All right.

Mr. GROSSMAN: Now, I respectfully call your Honor's attention to an entry on the last page of the registrant's questionnaire, dated February 4, 1952, which indicates that a Form 110 was mailed to the registrant, notifying him of his classification 1-A-O, which was given to him by the appeal board by a vote of 3 to 0. That card was admittedly received by the defendant.

12 Mr. ADLERSTEIN: That was received.

Mr. GROSSMAN: I now offer as Government's Exhibit 2-K, SS Form No. 252, which is an order to report for induction. It is dated February 6, 1952, an order to defendant Harry Gray Nugent to report at the armed forces induction station, 44 Whitehall Street, New York City, at nine A. M. on February 21, 1952.

(Marked Government's Exhibit 2-K.)

The COURT: What form did you call this? SS what?

Mr. GROSSMAN: 252. It is on the bottom of it.

The COURT: I thought you said 110.

Mr. GROSSMAN: No, 110 was what I read from the questionnaire, your Honor, which was the postcard mailed to him.

Now, I would like to offer as Government's Exhibit 2-L a copy of a letter which was sent to the registrant on February 12, 1952, and signed by Candler Cobb, New York City Director of Selective Service, which reads as follows:

"Dear Mr. Nugent: This will acknowledge receipt of your special delivery letter dated February 9, which arrived this morn-

ing. I have been over your file and feel it would serve no useful purpose for me to interview you. You have been granted all your procedural rights and your order for induction must stand. Sincerely yours; Candler Cobb, New York City Director" a copy of which was sent to Local Board 40.

(Marked Government's Exhibit 2-L.)

Mr. GROSSMAN: I might, in connection with that, if your Honor please, offer as Government's Exhibit 3, because it is no part of his file, a photostatic copy of the letter which I have received which the registrant addressed to Colonel Cobb, a letter dated February 9, 1952, together with certain exhibits which the registrant sent special delivery to Colonel Cobb, and the answer to which is

Government's Exhibit 2-L.

13 I now offer this as Government's Exhibit 3.

(Marked Government's Exhibit 3.)

Mr. GROSSMAN: I now offer as Government's Exhibit 4 a letter dated February 21, 1952, from the Headquarters, U. S. Armed Force Induction Station, 39 Whitehall Street.

(Marked Government's Exhibit 4.)

(Mr. Grossman reads Exhibit 4.)

Mr. GROSSMAN: If the Court please, the Government rests at this time.

HARRY GRAY NUGENT, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. Adlerstein:

Q. Mr. Nugent, do you recall receiving a notice to appear for a hearing before Mr. Gallagher?

A. Yes, I did receive a notice to appear before Mr. Gallagher.

Q. Well, just say yes or no.

A. Yes.

Q. Did you with that notice receive these instructions from the Office of the Attorney General, dated September 1, 1948 (handing to witness)?

A. Yes, I received those instructions and—

Mr. ADLERSTEIN: Well, I will offer the instructions in evidence.

Mr. GROSSMAN: May I see them?

(Mr. Adlerstein hands to Mr. Grossman.)

Mr. GROSSMAN: No objection.

(Marked Defendant's Exhibit A.)

14 Mr. ADLERSTEIN: If your Honor please, for the purpose of the record I would like specifically to refer to Instruction 3.
The COURT: All right.

Q. Now, pursuant to these instructions, did you go to the office of Mr. Gallagher to ascertain whether or not there were any objections against your claim for conscientious objection?

A. I did go to the office.

Q. And whom did you talk to?

A. I spoke with Mr. Gallagher's secretary.

Q. Did Mr. Gallagher's secretary tell you whether Mr. Gallagher was in?

A. She told me that Mr. Gallagher was away on vacation.

Q. And did you have a conversation with the secretary?

A. Yes, I did.

Q. Will you tell us what that conversation consisted of?

Mr. GROSSMAN: If the Court please, I respectfully object to this line of questioning as immaterial. A conversation he may have had with Mr. Gallagher's secretary is not part of the Selective Service file in this case.

Mr. ADLERSTEIN: That is the reason I offered this particular Clause 3. I am going to show that he was deprived of a fair hearing by the conversation he had.

The COURT: With the secretary?

Mr. ADLERSTEIN: Yes.

The COURT: What is the scope of her authority to make any statement with respect to procedure under the Selective Service system?

Mr. ADLERSTEIN: When a man goes to the office pursuant to instructions, your Honor, and he has talked to somebody who is apparently in authority and follows those instructions, I think he has some right, some color of right, to follow them.

15 The COURT: Oh, I will take it, but it certainly is clear that she had no authority to make any representations or statement with respect to the matter. He may answer.

Q. Will you please tell us what that conversation consisted of?

A. I informed the secretary that I came to see Mr. Gallagher, to see if there was an evidence in the FBI file which would tend to defeat my claim for a 4-E classification.

The secretary informed me, when I told her of this, that the FBI files were favorable and that I should have no difficulty in receiving my desired classification. And Mr. Gallagher's secretary also asked me if I were going to bring anyone as an advisor, which is stipulated in that paper I submitted to you, your Honor, and I informed her since the FBI records are favorable, I saw no need of it.

She said "That is right, because I feel you should have no trouble in receiving your desired classification because of the good recommendation from the FBI." I thought no advisor would be necessary. It was merely a routine matter.

She said, "You should have no trouble in receiving your classification."

The COURT: Of course, all of this is set forth in Government's Exhibit 3, which is the letter that the witness sent to Colonel Cobb. Is that so, in substance?

Mr. GROSSMAN: That is correct. This claim was reviewed by Colonel Cobb. I therefore move—

The COURT: Where do you see a reference in this exhibit, Defendant's Exhibit A, under Item 3 to an advisor? You referred to an advisor in your testimony and also referred to an advisor in Government's Exhibit 3.

16 The WITNESS: Your Honor, I believe that it is in the papers.

Mr. ADLERSTEIN: If your Honor reads the instruction sheet, Defendant's Exhibit A, it says he can bring along anybody as a witness.

The COURT: I understood that and that is precisely the reason why I am asking the question. You directed my attention, as Mr. Adlerstein did, and also the witness, to Item 3 in Defendant's Exhibit A, and the witness in his testimony has referred to an advisor being present at this hearing and in his letter which is Government's Exhibit 3, which was addressed to Colonel Cobb, he also made reference to an advisor.

I am asking both of you, that is, counsel and the witness, to point out where there is any reference to an advisor?

Mr. ADLERSTEIN: I think there may be a reference in another section to a witness or an advisor; I am not sure.

The COURT: You specifically directed my attention to that in the list of instructions.

Mr. ADLERSTEIN: Yes.

The COURT: And I don't see it there.

Mr. ADLERSTEIN: I wanted to shorten it, but the entire instructions are in evidence. What I wanted to say is that this deprived the man of a full hearing which is provided for in Clause 3. That is my contention. If your Honor looks, I think it is probably Clause 2, you will find that he is entitled to bring along witnesses. I am not sure of the exact clause, but it is in the neighborhood of 2 or 3.

The COURT: Well, Item 3, as I read it, has reference to being permitted to make a full and complete presentation of his claim and to bring with him at the hearing any witnesses or persons hav-

ing personal knowledge of the facts concerning his religious training and belief and concerning the character and good faith of his objection to participation in any form of war.

You may have reference to another item. I don't know.

Mr. GROSSMAN: Well, I think that is what he is referring to.

Mr. ADLERSTEIN: Can I go ahead, your Honor?

The COURT: Well, there is an item here under 5, which you undoubtedly have reference to: The registrant may bring with him a relative or friend or advisor, who may sit with him at the hearing. Is that what you had reference to?

Mr. ADLERSTEIN: That is one of the things I had reference to.

The COURT: Go ahead.

By Mr. ADLERSTEIN.

Q. This advisor you are referring to: Is he Mr. Martin Mitchell, who was referred to in Government's Exhibit 2-F?

A. Yes, he is. He is in the courtroom now.

Q. And he would have testified concerning your beliefs?

A. Yes, he would.

Mr. GROSSMAN: I object, your Honor, to the form of the question.

The COURT: I will take it. The fact is that there is a statement in there already by Mr. Mitchell.

Mr. GROSSMAN: Yes.

Q. When you came before Mr. Gallagher for a hearing, will you tell us what questions he asked you and whether or not he permitted you to give a complete answer?

Mr. GROSSMAN: Objection, your Honor. The full testimony, all the questions and answers, are already in evidence.

18 The COURT: Well, he states that the transcript is not a correct transcript.

Mr. ADLERSTEIN: That is right.

The COURT: I will take it.

Q. Will you state whereon Mr. Gallagher prevented you from making a full statement of your claim?

A. When I arrived at Mr. Gallagher's office, Mr. Gallagher asked me to state my religious belief and why I had come to the conclusion that I came to, and I started to inform Mr. Gallagher of my progression of conscience and progression of faith, and Mr. Gallagher stopped me before I could hardly get started, and said I was too voluminous, and he told me then to answer all questions with yes or no.

Though I did state yes or no in my answers, I was nevertheless limited by Mr. Gallagher because the questions moved rather

rapidly, which didn't give me too much time to hear any questions. It was a rapid hearing, and I feel that Mr. Gallagher—that it was—there was a point where I tried to quote the Scripture to Mr. Gallagher, and Mr. Gallagher claimed that his file was full of my religious beliefs and he did not permit me to quote the Scripture I was trying to.

Q. More than a year and a half expired from the time you filed your questionnaire to the time you filed your Form 150 stating your conscientious objection, is that right?

A. Yes.

Q. When Mr. Gallagher stopped you, was it your intention to show what your progression was, and your change from a 1-A-O over to a 4-E classification?

A. That is what I was trying to point out to Mr. Gallagher, that there was over a year in which I had, which I continued to study the Scriptures and the Lord's will concerning His children. There was over a year where I had developed in my faith, but these things Mr. Gallagher would not permit me to say.

19 Q. Mr. Gallagher, in his report that is part of Government's Exhibit 2-J, said you were lazy, shiftless, morally a weakling, and you had unusual motion in walking. Did Mr. Gallagher talk to you about any of these things at the hearing?

A. He made no statement about any of these things whatsoever.

Q. Did he tell you that the FBI report contained such statements?

A. He never mentioned the FBI report.

Q. Did Mr. Gallagher ever tell you anything about the contents of the FBI report?

A. He never mentioned the FBI report or the contents of it.

Mr. GROSSMAN: If your Honor please, I must object to this line of questioning. The FBI report is confidential, and Mr. Adlerstein well knows it. In preliminary motions before this trial, that was taken up. He was denied access to the FBI file.

The COURT: Oh, I will let it stand.

Mr. ADLERSTEIN: I would like to state at this time that I was going to make a motion on that ground, that when a person has a hearing, in order to have a due hearing, he is entitled to know the contents of all documents used against him at that hearing. It may not be available in this court at the time we make motions, but it must be available at that hearing.

I think that is referred to in various Supreme Court reports—I don't say in connection with this type of case, but it is referred to in other cases. A person is entitled to a full and fair hear-

ing. He is entitled to know the contents of documents used on the hearing.

Q. Mr. GALLAGHER said you had an easy believing religion, calling for little effort and practically no sacrifice. That is stated in his report. Did Mr. Gallagher ever discuss the sacrifices required by your religion?

A. He never discussed them.

20 Q. The minutes, which are also part of Government's Exhibit 2-J, refer to the fact that you spoke to a Mr. Nichols about your conscientious beliefs. Did Mr. Gallagher attempt to fix any time when you had spoken to Mr. Nichols?

A. No, he did not mention any date or try to fix any.

Q. According to the minutes just referred to, Mr. Nichols at that time was in the Government service, is that right?

A. That is right.

Q. He was in the Army?

A. He was.

The COURT: Well, doesn't the minute itself show that he was in the Army?

Mr. ADLERSTEIN: It does.

The COURT: Did you tell that to Mr. Gallagher?

The WITNESS: Mr. Gallagher mentioned it to me, he says, "I see Mr. Nichols is in the Army," and I said, "That is so."

He said, "Apparently he doesn't embrace your belief."

I said, "He doesn't hold to my belief, but he believes I am sincere."

Mr. ADLERSTEIN: Will your Honor permit me to read for the purpose of the record from Government's Exhibit 2-J, the minutes of the hearing before Mr. Gallagher?

The COURT: Well, they are already in evidence.

Mr. ADLERSTEIN: I agree, your Honor, but the Government has been reading from these documents. I would like to get a specific part into the record, if you will permit me.

The COURT: I will permit you to do it, but I don't see that it adds anything to the record. If you have a special purpose in reading it in, I will allow you to.

Mr. ADLERSTEIN: I have a special purpose.

The COURT: Well, go ahead.

Mr. ADLERSTEIN: This is a question by Gallagher:

21 "Q. Did you ever tell any of your friends or any of your neighbors about your beliefs with reference to this religion of yours?

"A. I believe it is my duty to tell my belief—

"Q. Wait a minute. Just answer the question.

"A. Yes.

“Q. From whom?

“A. Mr. William Nichols, at 678 East 24th Street, where I lived, near my former address. Mr. Irving Levitt, 120 Commonwealth Place, in the building where I live; Mr. Sam Mandelbaum, 678 Clermont Road. It is hard to enumerate them. I speak to many people.

“Q. Was that recently?

“A. Well, I constantly speak of my religion.”

Mr. ADLERSTEIN: Well, that is all with this witness, your Honor.

The COURT: May I see a copy of the minutes.

Cross-examination by Mr. GROSSMAN:

Q. Mr. Nugent, I refer to Government's Exhibit 2-J, the portion thereof set forth in the minutes of hearing held on July 26, 1951. Can you tell us where that hearing was held?

A. It was held, I believe—it was held in Brooklyn. The hearing—

Q. At Mr. Gallagher's office?

A. At Mr. Gallagher's office.

Q. Who else was present besides you and Mr. Gallagher?

A. He had a gentleman there. He was taking, making a stenographic record of some of the comments that were made.

Q. Did this gentleman take it down by pencil on a book or did he have a machine?

A. He took it—I believe he was taking it down by pencil on a book.

Q. You state now that he only took some of the comments?

A. He only took down what Mr. Gallagher didn't strike out of the record.

22 Q. I show you now a copy of Government's Exhibit 2-J, and ask you whether all those questions were put to you and you made all those answers?

A. These questions were asked me, but these are not all the questions that were asked me. These are the ones that were not struck out from the record.

Q. And these are all the answers you gave to those questions?

A. These are the answers.

Q. Now, can you tell us at what point questions were asked and you made answers that were not recorded or that were struck out from the record? Was it at the beginning or at what point in the examination?

A. Well, after Mr. Gallagher asked me my address in the beginning and I gave it to him, and where I was born, and I gave him the date of my birth and so forth, then he asked me at that point what is the nature of my religious beliefs and why I had come, what brought me to the conclusions I have come to.

At that point I proceeded to tell Mr. Gallagher, but he interrupted me and I had no opportunity to show that there was a progression of faith on my part, a progression of conscience which increased my responsibilities towards God, as my knowledge increased.

Q. Mr. Nugent, you also stated that Mr. Gallagher asked you what religious organization you belonged to, and that that question was not recorded, either.

A. What religious organization?

Q. That is right.

A. He asked me who I met with. I told him. I didn't say that that wasn't recorded.

Q. It is recorded?

A. Yes.

Q. You see that at the bottom of page 1?

A. Yes.

Q. You also stated that at one point you quoted from the Scripture and Mr. Gallagher struck that from the record. On direct examination you so stated; is that right?

A. That is correct.

Q. Now, I refer you to page 2, the next page of the examination, the top question and answer. You quoted from the Scripture there, did you not, Mr. Nugent?

A. I had quoted from the Scripture to Mr. Gallagher, but apparently there were Scriptures that he did not particularly care for, and he struck them from the record.

Q. At what point in the examination did you make other quotes from the Scripture that were stricken from the record?

A. I cannot point out any one point, but all through the examination there were questions asked me, that he did instruct the stenographer to strike out from the record, and there is—the points are not few enough to enumerate them.

Q. Well, in reading this examination, Mr. Nugent, the questions in the main seem to read fairly continuous; that is, one question reads into another after your answer, is that not a fact?

A. There are questions which do lead one into another, I agree, but there are questions here; there are points here that I remember very vividly where Mr. Gallagher asked me certain questions in regard to my religion, and there were other places he would not let me finish on that point. Such as saluting the flag, which is in the record. He asked me would I salute the flag, and I said no, I would like to clarify my statement.

He said that would be all right, but I did want to clarify that statement.

Q. That is in the record exactly, isn't it?

A. Yes.

Q. There have been no deletions or no strikings?

A. Not on that particular point. On that particular point he simply did not permit me to go into detail on my reasons and also to clarify my statement.

Q. How did Mr. Gallagher put it to the stenographer when he wanted something stricken from the record?

A. Well, I remember Mr. Gallagher said, "We will just strike that out," and then he would rearrange, reword his question, or put another light on his question, a different type of question, and then inject it there.

24 Q. Did you at any point make any objection?

Mr. ADLERSTEIN: Well, I object to that. I don't think that is called for.

The COURT: I will allow it.

Mr. ADLERSTEIN: The instructions are that the hearing is informal, and I don't think he is permitted to make an objection.

The COURT: I will let him answer.

Q. Did you state to Mr. Gallagher at any point that you would like contained in the record what you were saying?

A. Well, at that time I didn't state to Mr. Gallagher at any point—Mr. Gallagher just said, just proceed, and struck out certain things, certain questions, and I didn't press that issue at the time.

Q. I show you now Government's Exhibit 2-A in evidence, your SS Form 100, your original Selective Service questionnaire, and ask you if that is your handwriting contained on page 7 of that questionnaire?

A. Yes, it is my handwriting.

Q. Will you read the statement that you made in your handwriting in the middle of that page?

A. This questionnaire that I received—

Q. Just read it, Mr. Nugent.

A. "Due to religious beliefs I will only serve as a non-combatant," and at that time—

Q. That is all I asked you. You made that statement at that time?

A. I did.

Q. You knew what you were doing?

A. I did.

Q. You understood that statement at the time?

A. I did.

Q. You still understand that statement?

A. I understand it far more thoroughly than I did at that time.

Q. And you were subsequently classified by your local board and by the appeal board after your appeal in Class 1-A-O?

A. Yes.

25 Q. Which is a non-combatant classification?

A. That is correct.

The COURT: Was that a true statement when you made it?

The WITNESS: That was a true statement when I made it.

Mr. GROSSMAN: No further questions.

Redirect examination by Mr. ADLERSTEIN.

Q. When you made the statement which was just read to you, while you believed it at that time, you were going to show Mr. Gallagher a change in your religion which did not permit you afterwards to adopt that statement, is that correct?

A. That is so.

Q. Now, when you went to the hearing before Mr. Gallagher, did you assume he had full authority to conduct the proceeding?

A. Well, that is what I understood.

Q. You didn't think you had any right to object to the way he conducted it?

A. Well, I didn't know what authority I would have. I felt that the situation was completely out of my hands there.

Q. You had no legal advice on the subject?

A. No.

Q. And you had no legal advice?

A. None with me.

Mr. ADLERSTEIN: That is all.

Mr. GROSSMAN: No further questions.

Mr. ADLERSTEIN: The defendant rests. Will your Honor hear me on a motion?

The COURT: Yes.

MOTION TO DISMISS THE INDICTMENT AND FOR AN ACQUITTAL AND DENIAL THEREOF

Mr. ADLERSTEIN: The defendant moves to dismiss the indictment and for an acquittal on the following grounds:

26 The defendant was entitled to have witnesses at the hearing but he failed to bring a witness that he intended to bring because he was lulled into a sense of security by the statement of the secretary, which statement was relied on by the defendant.

Second, the defendant did not have a full and fair hearing before the hearing officer, on the ground that he was not permitted to explain his progress in religion which changed his ideas, from the 1-A-O classification which he had requested, to a 4-E classification; and this was in violation of the Selective Service Law of 1948, Section 6J and regulation 1626.25, which permits a full and fair hearing.

Three, defendant did not have a fair hearing because the FBI report, which is supposed to be made pursuant to the Selective Service law, Section 6J, and the regulation 1626.25, was never adverted to at the hearing, nor were the contents disclosed to the defendant. He should have been advised of its contents so that if there were anything objectionable, he could have answered it, and if there was anything in his favor, he could have had the benefit of it.

On the fourth ground, that many of the items of explanation were stricken from the record, thus not giving the defendant a chance of a fair hearing.

Fifth, the finding that the defendant did not qualify as to religious affiliation was in violation of Section 6J of the Selective Service and Training Law, and a violation of regulation 1622.20, because belonging to any religious organization or sect is not required, and the finding is without basis in fact, as will be seen from Government's Exhibit 2-H, and the statement made in the record by the Asst United States Attorney General about the case and defendant was prejudiced by reason of that.

Six, that the finding that no one was apprised of the claim of the defendant before the emergency is against the evidence, as the record shows that the defendant had spoken with Mr. Nichols, who was then in the Army continually, and the hearing officer did not try to fix a date when he had spoken to Mr. Nichols.

Seventh, the hearing officer's statements and findings were arbitrary and capricious on the following ground:

There were character and personality statements made in the report which had no reference whatsoever to the minutes, had no effect on the conscientious objection of the defendant and indicated a prejudice on the part of the hearing officer. The religious sacrifices of the defendant were not discussed, although it was reported at the conclusion by the hearing officer.

The defendant was not given an opportunity to explain why he would not salute the flag, and therefore his case was prejudiced.

The hearing officer criticized the spelling of the defendant, which has nothing to do with his conscientious objection to war. The statement that he made that defendant's claim is not founded on truth or fact is not founded in any of the evidence.

Eight. There is no basis in fact for the hearing officer's conclusions.

Nine. The findings of the Assistant Attorney General favor the defendant. That the Assistant Attorney General did not have the benefit of the FBI report or the evidence of the defendant showing his progress from the claim of 1-A-O to 4-E. Therefore he was prevented from making a fair and honest conclusion, after reading

what the defendant would have said regarding his progress in religion.

Those are my grounds.

Mr. GROSSMAN: Your Honor, I would like to answer especially this contention of the defendant about his gradual change
28 from his belief, or his religious belief, as being opposed only first to non-combatant duty and subsequently opposed to all types of military duty.

I respectfully maintain that your Honor must disregard that under the Selective Service law and regulations, because the defendant, the registrant rather, has a right at any time to go back to the board and ask for a new classification where he has any additional evidence. Section 1625.1 and 2 specifically talks about reopening the registrant's classification; that a classification is not permanent and when he has new evidence, it may be considered anew.

His failure to go back to the board is no reason why it should be considered subsequently by other authorities. He had his remedy and he failed to take advantage of it. It was mere afterthought, we feel.

Secondly, I think the hearing before the Government appeal agent, namely, Mr. Gallagher, shows a continuity of questions, one question practically following another; that each thing was taken down. When Mr. Gallagher asked a question and got no answer, he so stated in the record, so as to make it clear that there was no answer.

As to the other point raised about the FBI reports: it has been determined that they are confidential; that they are for the hearing officer to use in making his advisory recommendation.

Mr. Adlerstein also raises the point that he should have set a date as to when the defendant spoke with Mr. Nichols. Such matters are immaterial in setting this man's classification and religious beliefs.

I feel that he was given a more than adequate hearing under the law, and Mr. Gallagher wrote a report of that hearing which was concurred in by the Department of Justice, all of which opinions are merely advisory when they go back to the appeal board.

Mr. Adlerstein: Will your Honor permit me to make a short statement regarding this?

29 The COURT: Yes.

Mr. ADLERSTEIN: In his report the hearing officer says, "In all events, this registrant definitely has not qualified as a conscientious objector as to church affiliations, religious beliefs, or any statement or affirmative action which were attested to by anyone on his behalf made prior to the National Emergency.

That is why I asked whether Mr. Gallagher had fixed the date when he made these statements to Mr. Nichols. Now, if he had

asked that question, then I think this statement could not have been made by Mr. Gallagher, since there was no basis for this statement. Mr. Gallagher should have predicated what he stated upon such state of facts.

Not having done so, I claim that that conclusion of Mr. Gallagher was unwarranted.

I also say that Mr. Nugent, the defendant here, did make the claim before the local board. A year and a half expired before he filed his Form 150, because it wasn't sent to him. More than a year and a half after he filed his original questionnaire, and in this Form 150 he had asked the local board to classify him in 4-E.

So, therefore, your Honor, I say that he did make the claim before the local board, and not as Mr. Grossman has said, that he didn't make it until later on, when he claims it was an afterthought. This was no mere afterthought. It was a statement which was made in good faith before the local board, and had Mr. Gallagher asked a proper question concerning Mr. Nichols, had we been able to produce the witness before Mr. Gallagher, we would have been able to prove—

The COURT: What stopped you from producing the witness?

Mr. ADLERSTEIN: As I said, he was lulled into a sense of security by his talk with the secretary to Mr. Gallagher.

30 Here is a man who knows nothing about legal procedure. He gets information and he relies on that information. The man is really entitled to produce any proof he can if he is misled; even if it is in good faith, it is not his fault.

The COURT: You mean he can walk into an office and talk to a telephone operator or a stenographer and conclude—

Mr. ADLERSTEIN: No. Mr. Gallagher was out of town. He went pursuant to instructions. He certainly was entitled to get that—

The COURT: Well, let me see Exhibit 2-F. Who is the man you suggest that the defendant claimed he was going to bring with him before Mr. Gallagher?

Mr. ADLERSTEIN: This man Mr. Mitchell.

The COURT: Mr. Mitchell wrote a letter dated January 26, 1951, to the Selective Service system, which is Government's Exhibit 2-F, in which he made reference to this defendant, Harry G. Nugent, Jr., and the date that the hearing was held before Mr. Gallagher was July 26, 1951, some six or seven months thereafter.

I think one would have to be incredulous not to believe that this defendant had been in consultation with Mr. Mitchell some six or eight months before the hearing and that he knew he had a right to bring any person that he wanted to at that hearing, particularly Mr. Mitchell.

Mr. ADLERSTEIN: But we don't contend that, your Honor, he was going to bring him. He had spoken to Mr. Mitchell and wanted

to bring him, but he was misled into not bringing him. We don't say it was done wilfully, but we do say, nevertheless, he was misled. That would deprive him of a fair hearing.

The COURT: What would Mitchell have testified to?

Mr. ADLERSTEIN: He would have testified to the progress of this defendant, the date when he gave up his 1-A-O belief and adopted the 4-E stand.

31 The COURT: How would Mitchell know when he gave up his belief? He could only tell what the defendant told him. The defendant is the one who could state those facts, not Mr. Mitchell.

Mr. ADLERSTEIN: It seems to me that these regulations ask you to bring these witnesses for the purpose of testifying whether or not you have spoken to anybody about your belief. Those are the requirements of the law, and that is the only way you can prove it; not only by your own statements, but what you have said to other people. That is the nature of this type of belief and the nature of the Selective Service law.

The COURT: I should also like to call your attention to the fact that there is a rather substantial difference in the dates when this defendant was supposed to have been baptized. Mr. Mitchell said it was March 31, 1946, at the Emanuel Baptist Church in Brooklyn. I think the statement of the defendant in his own form indicated another date.

Where is the Selective Service form—

Mr. GROSSMAN: The original questionnaire, your Honor? I believe you have the original questionnaire.

The COURT: The defendant's statement in Exhibit 2-B under Series 4 in answer to Question 2b of that series is: "I became a member March 13, 1945, at 104 Clark Street, by baptism in water."

I will deny the motion.

Mr. ADLERSTEIN: I would like to make this one statement. I spoke to the defendant on that and he said he relied on his memory when he made it, but he says Mr. Mitchell's statement is the correct one. I don't think that is much of a discrepancy which would require rejection of the motion.

The COURT: It may not be.

Mr. ADLERSTEIN: Exception.

The COURT: Both sides rest?

Mr. GROSSMAN: The Government rests, your Honor.

The COURT: The Court finds the defendant guilty.

In reference to the statement made by the defendant in his original questionnaire in Government's Exhibit 2-A that he would

serve only as a non-combatant, there is substantial evidence to warrant the classification made by the board.

Mr. GROSSMAN: The Government is ready for sentence, if your Honor desires to sentence the defendant at this time.

The COURT: As a matter of fact, the evidence indicates that the board classified the defendant precisely as he asked to be classified in his original request.

Mr. ADLERSTEIN: As I said, your Honor, we didn't have a fair chance to prove it.

The COURT: There is certainly no evidence to indicate that.

Mr. ADLERSTEIN: Well, I can't introduce that evidence here. I have to produce something for the hearing officer, because this court cannot classify a registrant. If your Honor will permit me, I will introduce the evidence here, but I don't think your Honor has jurisdiction to hear it.

The COURT: You know that I don't. I will take the defendant's statement if you want to give it to me as to when he claims this change of attitude came about. At what precise point.

Mr. ADLERSTEIN: Yes, I would like the defendant to make that statement.

Mr. GROSSMAN: I have no objection to your taking it. I think it is already contained in the papers, your Honor. His own statement in the letter to Colonel Cobb, where he talked about his progression.

The COURT: Well, he talks about his progression in general here. I am asking specifically when he reached the point that he decided he would not serve as a non-combatant, and it was contrary to his religious belief.

33 Mr. ADLERSTEIN: Do you want the defendant to make it from here?

The COURT: It doesn't make any difference.

HARRY GRAY NUGENT, the defendant, resumed the stand:

By the Court.

Q. Now, Mr. Nugent, I asked you when you were under examination earlier whether or not the statement you had made in the original questionnaire that you would serve only as a non-combatant was true, and you said it was.

A. It was true, your Honor.

Q. When, for the first time, was that statement not true as far as your religious beliefs were concerned?

A. The first time was, I would say, about exactly one month after I mailed back my first questionnaire to the local board. It was at that time that I started to reconsider my position, and I questioned if it was the right thing, for I am a consecrated Christian.

The Scriptures tell us, we are admonished, children are admonished when He says:

"I beseech you, therefore, brethren, that by the mercies of God, you will offer your bodies a living sacrifice, holy, acceptable unto God, which is your reasonable service."

That is, I believe, to give my all to my Lord, my allegiance and everything. I felt if I would turn around now and swear into the armed forces, it would be simply taking away what I already agreed to give to God.

And the Scriptures tell us not to be transformed: "be not conformed to this world, but be ye transformed by the renewing of your mind that ye may prove what is that good and acceptable and perfect will of God."

34 That is what I did that day, and I started to prove it, what my religious belief was. It would be a contradiction if I were to swear my soul to the armed forces.

The Scriptures say: "Ye are not your own for ye are bought with a price." So I couldn't very well give myself to the armed forces or anyone else when I agreed to give my all to the Lord. It would be a contradiction to go into the Army. I also felt that any position I would take in any branch of the armed services nevertheless would be linked with the commission of human destruction. If I worked in a hospital, I would be relieving another man to go into the Army—a military hospital.

Q. And this knowledge came to you within one month after you had filled out the original questionnaire in which you had indicated a readiness to serve in non-combatant service? That is just the question I am asking you. Is that right?

A. Most of these conclusions I did come to within one month. The conclusions of progress in my stand to 4-E, I came to that conclusion in one month, your Honor.

Q. You have been a member of this Bible group for a considerable time before you signed the first questionnaire, had you not?

A. I was, your Honor.

Q. You had been a faithful Bible student member?

A. Yes, your Honor.

Q. And fully familiar with its doctrines?

A. Our doctrines are not formal—

Q. You have no formal doctrine, I understand that.

A. Our doctrines are the preaching of the Kingdom of Our Lord which will be established.

Q. You had familiarity with that doctrine?

A. Yes.

Q. The time you filed the first questionnaire in February, 1949?

A. I was familiar with our doctrines, yes.

Q. And you knew those doctrines were substantially important in connection with filling out the questionnaire?

35 A. These doctrines that we express are not doctrines—we do not try to set up standards for others as far as conscientious objection is concerned.

Q. This was a standard you were permitted to set up for yourself under the questionnaire and you understood it to be such at the time; did you not?

A. I did understand it.

Q. Had you, as a matter of fact, consulted with fellow members prior to filling out this questionnaire?

A. Not prior to filling out the first questionnaire, no.

Q. When had you consulted for the first time with fellow members?

A. I consulted the first time with Mr. Martin Mitchell, after my filling out of the first questionnaire.

Q. How long after filling out the first questionnaire?

A. I believe I consulted with him about a month or two months after that. I don't really remember the first time I consulted with him.

Q. Is it mere coincidence that you consulted with him about a month or two after filling out this questionnaire and that that was the time you discovered that the original answer that you were prepared to serve in non-combatant service was not a true reflection of your attitude?

A. Your Honor, in my consulting with Mr. Mitchell, he didn't advise me to take a stand as to 4-E; neither did he advise me not to. But I simply informed him, and I am not sure, your Honor, of the date, but I simply informed him that I was going to ask for a 4-E classification, and I also told him my reasons why, but Mr. Mitchell didn't advise me to take any particular stand. Simply as an advisor to us after we told him the stand we had taken.

Q. You had told Mr. Mitchell when you consulted with him after you had filled out the first questionnaire in which you had indicated a readiness to undertake non-combatant service, that that had been your answer, had you not?

36 A. I can't, as I say, I can't remember my first contact with Mr. Mitchell. I have known him for many years, and the first time I spoke with him pertaining to that subject, I don't know. So I am not positive of just what I said to him, but it was a few months. I am quite sure, after my first questionnaire that I discussed this, the draft situation, with him.

Q. Now, when you came to the change of attitude within a month after you filled out the first questionnaire, did you write to

W. J. HOLLISTER,
 L. H. NORBY,
 ROY E. MITCHELL,
 MARTIN C. MITCHELL,
 FRED MUNDALL,
 HENRY E. ANDERSON,
 W. N. WOODWORTH,
 FELIX S. WASSMANN,
 LUDLOW P. LOOMIS,
 FRED BRIGHT.

GOVERNMENT'S EXHIBIT 2-F

Selective Service System
 LOCAL BOARD NO. (40)
 JAN 30 1951
 850 Flatbush Avenue
 Brooklyn 26, N. Y.

BIBLE STUDENTS NATIONAL COMMITTEE

FOR RELIGIOUS CONSCIENTIOUS OBJECTORS

Thy Word
 is
 truth ..

CHAIRMAN: Martin C. Mitchell, 34 Hardy Lane, Levittown, N. Y.
 Edward Lorenz, 5633 Coliseum Street, Los Angeles 16, Calif.
 Adam Miskowitz, 937 North Karlov Avenue, Chicago 51, Ill.
 Raymond J. Krupa, 8191 Wisner, Detroit 34, Michigan

January 26, 1951

Selective Service System
 Local Board No. 40
 850 Flatbush Ave.
 Brooklyn 26, N. Y.

Re. Harry G. Nugent Jr.

50-40-29-474

1a 1-17-51 Acc.

GENTLEMEN:

Personally known to me since he was twelve or thirteen years old
 is Harry G. Nugent Jr.

62 Both his parents and he have been regular attendants at
 our Sunday meetings at 104 Clark Street. As members of
 our congregation he and his father in particular have also attended
 our mid-week Bible studies. His father is a Deacon in our church,
 of which congregation I am a minister.

your local board, saying that "since filling out the questionnaire which is now pending before your board, I have had a change of attitude, and the answer which I gave does not reflect my attitude with respect to non-combatant service"? Did you say that?

A. Your Honor, I felt—

Q. Go ahead.

A. I felt that the appropriate time to do that would be when I received my conscientious objector form. I had no idea it was going to be over a year before I received it.

Q. You were fully aware that you had asked them to classify you as a non-combatant, and you knew that they were taking action or processing your application at that time, did you not?

A. Your Honor, I was classified at that time 1-A, and I thought that classification would remain until I received a conscientious objector form, and when I did receive it, I asked for 4-E.

Then, after, of course, I went through and I had the hearing, and at the hearing they gave me 1-A-O. Then I appealed it.

Q. That was the one you had asked for originally, 1-A-O?

A. Yes.

Q. That was precisely what they gave you.

A. It was what I asked for originally, your Honor, but when I appeared there I didn't appear to ask for 1-A-O, but I was asking for 4-E.

I felt then it was a complete violation of my belief to be—to accept 1-A-O.

37 Q. Did you think, when you were coming to the conclusion as to this progressive attitude, that you were under a duty to notify them as a matter of candor that you did have a different attitude and that you no longer professed the belief that you could serve as a non-combatant? You say it violates your conscientious views; didn't you feel that that was required of you, as a moral man, to advise others whom you knew would take action upon the basis of your statement that you did have a change of attitude?

A. Well, as I said, your Honor, I thought the appropriate time to advise them would be when I received my conscientious objector form.

The COURT: All right.

Mr. ADLERSTEIN: Could I ask one question?

The COURT: You may ask as many as you want.

COLLOQUY

By Mr. ADLERSTEIN:

Q. You felt that your classification would not be completed until they had received the return of your Form 150 as to conscientious objector?

Harry Nugent (the registrant) was baptised by me March 31, 1946 at the Emmanuel Baptist Church in Brooklyn.

The religious background (Parents and Grandparents) and religious training and belief of the Registrant as expressed to me and known by me, are against his participating in war in any form. With him this includes non-combative as well as combative military training or service. I believe his beliefs to be such as to entitle him to exemption from military service as provided for in Section 6(j) of the Selective Service Act for 1948.

The Federal Bureau of Investigation is informed as to the attitude of the Associated Bible Students relative to the Selective Service Act of 1948, and have made the same a part of the permanent records of that Bureau.

All during the last war, most Draft Boards seemed desirous of doing the fair thing by acting in harmony with the law and the evidence, whether the decision rendered on this basis was to their personal liking or not. I also found the Hearing Officers interested in ascertaining the sincerity and convictions of the registrant and granting him the exemption or classification provided for by law, and this was done though they in no way shared his conviction.

Respectfully yours,

MARTIN C. MITCHELL,

Chairman & Executive Secretary.

63

GOVERNMENT'S EXHIBIT 2-H

Two Letters

February 16, 1951

Selective Service Headquarters,
350—5th Ave.,
New York, N. Y.

Re: Harry C. Nugent

S.S.No. 50-40-29-474

GENTLEMEN:

Please advise whether the Associated Bible Students Organization, that sponsors registrant's claim as a conscientious objector, is recognized.

Registrant has appealed, and I think such information should be in the file before it goes to the Appeal Board.

Very truly yours,

A. PETERS, Clerk,

LOCAL BOARD No. 40.

A. That is right.

Q. And that is why you didn't write any prior communication?

A. Yes.

Mr. ADLERSTEIN: I can produce Mr. Mitchell on the stand.

The COURT: Mr. Mitchell's statement is in evidence.

Mr. ADLERSTEIN: As to the date when he spoke to the defendant.

The COURT: After listening to this defendant's further testimony, I adhere to my original finding of guilty.

Mr. ADLERSTEIN: Exception. We are ready for sentence.

38 Mr. GROSSMAN: Your Honor has heard the evidence in this case. I would like to clarify one point: that one comment in the last bit of testimony by the defendant, namely, that he was waiting for his classification after his conscientious objector form. He wasn't classified until some time after he got his conscientious objector form and then for the first time was given 1-A, at which time Government's Exhibit 2-C went in, which is the request for a hearing.

He was given a hearing, and as a result of the hearing, was given a 1-A-O classification, at which time he was given every opportunity to state his change of belief or anything else if he so desired.

I would like to call your Honor's attention, to clarify one thing that seems to have drifted around here about Mr. Gallagher not having certain dates and other information.

For the record I would like to state that Mr. Gallagher had the advantage of a thorough report. Some twenty pages are here from the FBI confidential report.

Mr. ADLERSTEIN: I would like to object to that statement. There is nothing in the record—

The COURT: Well, it has no bearing on the trial proper, in any event.

Mr. GROSSMAN: There was much made of the fact that he didn't have certain information before him. We all know pursuant to the regulation he has such information before him and makes his findings both on the hearing before him and this other information which is contained in this file.

You will also note in this case that this defendant asked initially a classification for non-combatant duty, and he was given that classification finally, and it was determined that that should be his classification, both by the local board, by the appeal
69 board, by the hearing officer. That was their recommendation. And he failed to keep his part of the bargain, as we see it. When he asked for something, he got it; then he wanted a little more.

We feel that this is an outright change of mind on his part. When he saw that it was easy to get what he wanted, so to speak, he went after a little more. He didn't want any part of the service.

In view of that, your Honor, the Government has a recommendation to make as to sentence, if you would like to hear it.

The COURT: What is it?

Mr. GROSSMAN: The recommendation in this case is that the defendant be sentenced to five years.

The COURT: Do you want to make a statement on behalf of the defendant?

Mr. GROSSMAN: May I also point out to your Honor that the basis for that recommendation is that this man has given the Government all this trouble and effort to classify him, and he received the classification he desired, and, therefore, he should be given the maximum.

The COURT: That would hardly be a reason for giving the maximum. The fact that the Government had some trouble is no excuse for giving the maximum.

Mr. GROSSMAN: There is nothing in his file to indicate that there was any basis for his stand. He was active, as your Honor pointed out, in this group. He had never, although living fairly near the local board, come to tell the board.

The COURT: That could be a mistake of judgment. The trouble of the Government is not a ground for giving the maximum.

Mr. ADLERSTEIN: I would like to say that the defendant acted in good faith in this case, and that his own testimony speaks for itself. I think all the testimony in the record is in his favor.

I say if we had been given a reasonable opportunity, Mr. Gallagher couldn't have made the finding he did make. I think if he had referred to the FBI report in his statement, I think that it would be shown that the defendant acted in good faith.

I think there is evidence in the record from the Assistant Attorney General which shows the character of this defendant. I think the fact that he did not communicate with them for a year and a half cannot be weighed at all against this defendant because I think he is not expected to know all the intricacies of the Selective Service law, nor be thinking all the time what he should do. I don't think the man has any obligation to keep everything in mind all the time.

The fact that he said he thought the proper time to do that was when he got Form 150, I think your Honor ought to take into consideration. I don't think the case itself warrants any such thing as five years. In fact, I think a better recommendation is a suspended sentence. I think the man has shown his good faith.

The COURT: Does the defendant himself want to make any statement in addition to the one that counsel has made?

The DEFENDANT: I would like to make one statement in regard to what Mr. Grossman said to you. Mr. Grossman said if I could receive 1-A-O, I would like to get a little more. I was classified, your Honor, 1-A when I asked for a 4-E classification, and it wasn't after I received 1-A-O. I feel Mr. Grossman might have given that impression.

The COURT: Well, I have the feeling, and I think there is evidence to indicate that it is a justified feeling, that this defendant had been in close communication with representatives of the Bible Students National Committee, the officials of which clearly

41 knew and were fully aware of the requirements under the

Act and the various steps to be taken to see that men who were rightfully and properly entitled to the classification of exemption asked for by this defendant were actually granted their proper classification.

I think there is unmistakable proof throughout the record that such is the fact.

I have the feeling further that notwithstanding the suggested change of view brought about by progressive study or continued study, that the original statement reflected the true state of feeling and views of this defendant, and that the change of attitude was brought about after his classification was granted as a result of interest manifested by some of the representatives of the Bible Students group. That was their right. I am not quarreling with them, but nevertheless the true attitude of the defendant, I think, is reflected in the original answer, and the draft board gave him precisely what he asked for and which reflected his conscientious belief at the time.

SENTENCE

Under all the circumstances, the Court imposes a sentence of two and a half years. He is committed to the custody of the Attorney General to be dealt with accordingly.

Mr. ADLERSTEIN: Would your Honor release the defendant on bail pending appeal?

The COURT: You will have to go upstairs for that.

Mr. ADLERSTEIN: I think we have substantial ground.

GOVERNMENT'S EXHIBIT 1.

Waiver of Trial by Jury.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Stipulation C 137-349

UNITED STATES OF AMERICA, Plaintiff,

against

HARRY G. NUGENT, Defendant.

It is hereby stipulated and agreed by and between the defendant, Harry G. Nugent, his Counsel, Herman Adlerstein, Esq., and the United States of America by Myles J. Lane, United States Attorney, and his assistant, Louis Grossman, of Counsel, that after being advised by the court of the defendant's constitutional right to a trial by jury, the defendant, Harry G. Nugent, hereby voluntarily waives a trial by jury and consents to a trial before Judge Edward Weinfeld.

Dated: New York, N. Y., April 21, 1952.

HARRY GRAY NUGENT,
*Defendant.*HERMAN ADLERSTEIN,
*Attorney for Defendant.*MYLES J. LANE, G. H.
United States Attorney.

Approved:

EDWARD WEINFELD,
U. S. D. J.

GOVERNMENT'S EXHIBIT 2-A.

Page 7 of Classification Questionnaire.

SERIES XIV.—CONSCIENTIOUS OBJECTION TO WAR

INSTRUCTIONS.—Any registrant who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form shall sign the statement below requesting a Special Form for Conscientious Objector, (SSS Form No. 150) from the local board.

By reason of religious training and belief I am conscientiously opposed to participation in war in any form and for this reason

hereby request that the local board furnish me a Special Form for Conscientious Objector (SSS Form No. 150) which I am to complete and return to the local board for its consideration.

HARRY GRAY NUGENT

SERIES XV.—PHYSICAL CONDITION

INSTRUCTIONS.—Every registrant shall complete this series. Any registrant who answers any of the questions listed below by "Yes" and who believes himself physically disqualified for service in the Armed Forces may attach an affidavit from his physician, hospital, or sanatorium to support his claim.

1. Do you have any physical or mental condition which, in your opinion, will disqualify you from service in the Armed Forces?

Yes ☐; No x.

2. If the answer to Question 1 is "Yes," state the condition from which you are suffering —.

3. Are you now, or have you ever been, an inmate or a patient in a mental hospital or institution? Yes ☐; No x.

44 4. Are you now, or have you ever been, an inmate or a patient in a tuberculosis hospital or sanatorium? Yes ☐; No x.

5. If the answer to Question 3 or Question 4 is "Yes," give the name and address of each hospital, institution, or sanatorium —.

6. Have you had treatment from a physician for any condition within the last 5 years? Yes ☐; No x.

7. If the answer to Question 6 is "Yes," state each condition from which you suffered and give the name and address of the physician who attended you, and dates of each treatment —.

REGISTRANT'S STATEMENT REGARDING CLASSIFICATION

INSTRUCTIONS.—It is optional with registrant whether or not he completes this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, which will be taken fully into consideration regardless of whether or not this statement is completed.

In view of the facts set forth in the questionnaire it is my opinion that my classification should be Class —.

The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the local board in determining his classification.


Do to religious beliefs, I will only serve as a noncombatant.

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—1. Every registrant shall make the registrant's certificate. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the person who assists him in completing this questionnaire. 3. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than \$10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Selective Service Law of 1948.)

I, HARRY GRAY NUGENT, certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing are in my own handwriting.

Registrant sign here  HARRY GRAY NUGENT

GOVERNMENT'S EXHIBIT 2-B.

Form No. 150; Special Form for Conscientious Objectors.

SELECTIVE SERVICE SYSTEM

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

Selective Service No.—50-40-29-474

SELECTIVE SERVICE

LOCAL BOARD No. 40

44 Court Street,

Brooklyn 2, N. Y.

(Local Board Stamp)

Name—Nugent, Harry Gray

Address—120 Kenilworth Pl., Bklyn., N. Y.

This form must be returned on or before—10-13-50.

INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form No. 100).

The questions in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

47. Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector; *Provided* that the local board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

SERIES I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant training and service and, if my claim is sustained, I understand that I will, because of my conscientious objection to noncombatant service in the armed forces, be deferred as provided in Section 6(j) of the Selective Service Act of 1948.

HARRY GRAY NUGENT

SERIES II.—RELIGIOUS TRAINING AND BELIEFS

INSTRUCTIONS.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Do you believe in a Supreme Being? Yes ☒; No ☐.
48. 2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a supreme being involves duties which to you are superior to those arising from any human relation.

My letter answers this question. But I will state, We are to obey God rather than man. Acts 5:29.) No man can serve two

masters. Matthew 6:24) And our Lord said, If my kingdom were of this world, then would my servants fight. John 18:36.

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

I have been raised in the belief I now have. And at the age of sixteen, I began to read book's by Pastor Russell; and to meet with people with like minded faith. As a result, my faith grew into conviction, and my convictions lead me to consecrate my life to God. (Romans 12:1)

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

Mr. Ludlow P. Loomis, 145 W. Passaic Avenue, Rutherford, N. J.

5. Under what circumstances, if any, do you believe in the use of force?

Under no circumstances. In the Old Testament, the Jewish people were permitted to use force. But not so with the Christian. For he is given a new commandment, John 2:8 And is told to turn the other cheek ect. Matthew 5:39 & 5:43-44.

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

49 I am incessantly engaged in various activities in the showing forth the praises of him who has called me out of darkness into his marvellous light. I Peter 2:9

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

When the opportunity presents itself, I tell all those who have an ear to hear of my Lords' second presance and of his Kingdom soon to be set up. I do not preach conscientious objection. For I feel this is an individual matter.

SERIES III.—GENERAL BACKGROUND

INSTRUCTIONS.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (church, military, commercial, etc.).

Name of School—Type of School—

New Bridge Road School—Public—Grammar

Location of School—Dates Attended—

New Bridge Rd. East L. I. Meadow—From 1935 to 1940

Name of School—Type of School—

I don't remember—Grammar

Location of School—Dates Attended—

Kew Gardens L. I.—From 1940 to 1941

Name of School—Type of School—

PS. 152 & PS. 90 Brooklyn—Grammar

56 Location of School—Dates Attended—

152 Est. 24 St. Bk. PS. 90 Church & Deaf—From 1941 to 1945

Name of School—Type of School—

High School of Industrial Art—High School

Location of School—Dates Attended—

East 51 St. New York City—From 1945 to 1947.

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged; whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged.

Type of Work—Name of Employer—

Theater Usher—RKO Albee

Address of Employer—Period Worked—

Albee Sq. Bklyn, NY—From 1945 to 1945

Type of Work—Name of Employer—

Trying various Ideas with my Father

Address of Employer—Period Worked—

120 Kenilworth Pl.—From 1946 to 1947

Type of Work—Name of Employer—

Head of stock—Martian's Dept Store

Address of Employer—Period Worked—

501 Fulton St Bk. NY—From 1947 to 1948

Type of Work—Name of Employer—

Assisting my Father in Apt Bldg.

Address of Employer—Period Worked—

120 Kenilworth Pl. & 1650 Ocean Pk—From 1949 to 1950

51 3. Give all addresses and dates of residence where you have formerly lived.

Name of City, Town, or Village—State or Foreign Country—

New York City—New York

Street Address or R.F.D. Route—Dates of Residence—

44 East 57th St—From 1929 to 1935

Name of City, Town, or Village—State or Foreign Country—

East Meadow—Long Island

Street Address or R.F.D. Route—Dates of Residence—

Hemstead RFD 1—from 1935 to 1940

Name of City, Town, or Village—State or Foreign Country—

Kew Gardens—Long Island

Street Address or R.F.D. Route—Dates of Residence—

119-21 Met. Ave.—From 1940 to 1941

Name of City, Town, or Village—State or Foreign Country—

Brooklyn N. Y.—New York

Street Address or R.F.D. Route—Dates of Residence—

120 Kenilworth pl.—From 1941 to 1950

Name of City, Town, or Village—State or Foreign Country—

Brooklyn N. Y.—New York

Street Address or R.F.D. Route—Dates of Residence—

1650 Ocean Parkway—From 1950 to 19 ?

4. Give the name and address of your parents and indicate whether they are living or not.

Mr. Harry A. Nugent 1650 Ocean Parkway Brooklyn 23 N. Y.

Mrs. B. Nugent 535 Second st. Henderson Ky. Both parents are living. The address of my mother is temporary.

52 5. (a) State the religious denomination or sect of your father—My Father is a Associated Bible Student

(b) State the religious denomination or sect of your mother—And my mother believes the same.

SERIES IV.—PARTICIPATION IN ORGANIZATIONS.

INSTRUCTIONS:—Questions 1, 2, and 3 in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

2. Are you a member of a religious sect or organization? Yes. If your answer to question 2 is "yes," answer questions (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

We are a independent congregation of Associated Bible Students. Address is 104 Clark St Bklyn N. Y. Post Office Box 225.

(b) When, where, and how did you become a member of said sect or organization?

I became a member March 13, 1945 at 104 Clark St. by baptism in water.

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

Associated Bible Students, Brooklyn Ecclesia 104 Clark St
Brooklyn N. Y.

53 (d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

Mr. Martin C. Mitchell Elder. 130-33 228th Street Laurelton
L. I.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

The official statement is inclosed.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

SERIES V.—REFERENCES

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

Name—Full Address—

Mr. Bill Nichols—678 East 24th St Bklyn, 10 N. Y.

Occupation or Position—Relationship to You—

Traffic Clerk—Friend

Name—Full Address—

Mr. Ward Daisenberger—70 Jefferson St New York

Occupation or Position—Relationship to You—

Head Poter—Friend

Name—Full Address—

Mr. Michael Kelly—99-41—64 Ave Rego Park L. I.

Occupation or Position—Relationship to You—

Bldg. Supt.—Friend

54 Name—Full Address—

Mr. Bob Weiner—145 Sea Breeze Ave Bk. N. Y.

Occupation or Position—Relationship to You—

Messenger—Friend

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—1. Every registrant claiming to be a conscientious objector shall make this certificate. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the person who assists him in completing this questionnaire. 3. If the

registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than \$10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Selective Service Law of 1948.)

I, HARRY GRAY NUGENT, certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing in my own handwriting.

Registrant sign here—HARRY GRAY NUGENT.

ARTHUR KRUMPOLT
LUDLOW P. LOOMIS

55 If another person has assisted the registrant in completing this questionnaire, such person shall sign the following statement:

I have assisted the registrant herein named in preparation of this questionnaire because

One of the important items of the convention was the passing of a resolution expressing the conviction of the brethren relative to participation in war. The resolution follows:

"Whereas the Congress of the United States has enacted a conscription law and this law affects the young men of our fellowship, we in General Convention assembled at Chautauqua, Ohio, as representatives of the various Bible Student Congregations of the United States, take this opportunity to clearly state our position regarding participation in military service and training in time of peace or time of war.

"For the past sixty years the teachings of Pastor Russell in the Six Volumes of 'Studies in the Scriptures,' 'Tabernacle Shadows,' and his other writings, have and still do represent the convictions of all those in our fellowship and service.

"Our convictions are the same today as they were during World War I and World War II. We believe that we as Christians should not engage in military service and training. This conviction is based upon our belief that we are children of God, whose laws forbid participation in war.

"Further, we recognize the individuality of every Christian in the exercising of his conscience in harmony with the obligations or vows he has made to his Creator."

"It is moved that we the Bible Students General Convention, assembled at the Miami Valley Chautauqua, Chautauqua, Ohio, August 1-8, 1948, declare the above statement is a proper expression of our conscientious convictions."

I hereby certify that I was Chairman of the Bible Students General Convention held at Chautauqua, Ohio, August 1-8, 1948; and that the resolution, declared and adopted, appearing above, is a true and correct copy of the original resolution printed in the Convention report.

[SEAL.]

G. M. WILSON

Member,

Bible Students General

Convention Committee.

Sworn and subscribed before me this 9th day of October, 1950.

NANCY B. WASSMANN,

Notary Public of N. J.

My commission expires Sept. 28, 1955.

10/12/50.

Selective Service,

Local Board No. 41,

44 Court St., Bklyn. 2, N. Y.

DEAR SIRs:

The intent and purpose of this letter, is to make clear to you my position as a conscientious objector. If further information is required I shall be glad to see you at your convenience.

I believe, that my Lord through St. Matthew answers your questions to my mind quite clearly. When he states in Mat. 6:24 No man can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other. Ye cannot serve God and Mammon;

I can not in sincerity pledge myself to any branch of the armed forces. For my allegiance is to God alone.

I can not give myself to this or any other country. For I am not my own. I am bought with a price 1 Cor. 6:19, 20.

In Rom. 12:1. The Lord admonishes us through the Apostle to consecrate our lives to him. When he says, I beseech you therefore brethren; By the mercies of God that you present your bodies a living sacrifice, Holy acceptable unto God which is your reasonable Service.

This dear Sirs, is what I have done. I have given my all to my Lord in consecration to Him.

This I believe to mean, is to lay my life down daily in his service. And to give up all earthly hopes aims and ambitions. And receive, instead, the Heavenly ambitions, to give all ~~at~~ my disposal in his service.

If I were to swear an allegiance to the armed forces, I would be attempting to take from God what I have already given to him. That would be in strict violation to my conscience. For the scripture says in Luke 9:65 And Jesus said unto him, no man having put his hand to the plow and looking back, is fit for the kingdom of God I will now endeavor to cite a few of the scriptures which I believe supports me in my refusal to disobey the commandments of God given to his Church. In that we should love our enemies. This would not permit me to kill my enemies, or even injure them.

In Math. 6:43, 44 Our Lord says, ye have heard that it hath been said, Thou shalt Love thy neighbor and hate thine enemy. But I say unto you, Love your enemies, Bless them that curse you and do good to them that hate you. And pray for them which despitefully use you, and Persecute you. And also in in Mat. 5:39

Our Lord states, But I say unto you, that ye resist not evil. 58 But whosoever shall smite thee on the right cheek turn to him the other also These commandments were given to the Christian. And I, being a Christian find it impossible to ignore them. I will not kill.

My weapons are not carnal. For though we walk in the flesh. We do not war in the flesh. For the weapons of our warfare are not carnal but mighty through God to the pulling down of strong holds

2 Cor. 10:3, 4

The scriptures speak of the Lord's true Children as being Ambassadors for Christ.

2 Cor. 5:20

And as an Ambassador for Christ I could not enter into the armed forces. As an Ambassador, I represent Christ's Kingdom soon to be set on earth.

I have nothing to do with this worlds politics or wars.

My Lord said, my kingdom is not of this world. If my kingdom were of this world then would my servants fight.

John 18:36

Yours Sincerely,

H. G. NUGENT.

P. S. This form was mailed to my old address and was not forwarded to me.

-59

ASSOCIATED BIBLE STUDENTS

POST OFFICE BOX 225, BROOKLYN, NEW YORK

Thy Word

is
truth.

SUNDAY SERVICES

Afternoons and Evenings

104 CLARK STREET

M. C. MITCHELL, Executive Secretary,
130-33 228th St., Laurelton, L. I., N. Y.MICHAEL KELLY, Recording Secretary,
99-41 64th Ave., Rego Park, L. I., N. Y.STUART LIVERMORE, Treasurer,
93 Kissam Ave., Oakwood Heights, S. I., N. Y.

November 14, 1948

The following Resolution was adopted by the independent congregation of Associated Bible Students meeting at 104 Clark Street, Brooklyn, New York on November 14, 1948:

RESOLVED that our position relative to the Selective Training and Service Act of 1940 is also our position relative to the Selective Service Act of 1948; and that we hereby again go on record with the proper governmental authorities and declare:

THAT as Consecrated Christians, "obedient to the powers that be", insofar as such obedience does not conflict with the teachings of the Bible, particularly as expressed in the words of Jesus and his Apostles, which we understand to be against the

Christian's participation in war;

60 WE DO HEREBY request that those of us who conscientiously feel bound to refuse military service of any description be exempted as conscientious objectors from such training as provided for in Section 6(j) of the Selective Service Act of 1948.

Respectfully submitted,

ASSOCIATED BIBLE STUDENTS

104 Clark St., Brooklyn, N. Y.

MICHAEL J. KELLY,

Secretary

Signatures of Elders of the Congregation:

PANTEL HATGIS.

NEW YORK CITY HEADQUARTERS
SELECTIVE SERVICE SYSTEM

350 Fifth Avenue

New York 1, N. Y.

Refer to file
12-23-tl

February 23, 1951

Selective Service System
Local Board 40
850 Flatbush Avenue
Brooklyn, N. Y.

Selective Service System
LOCAL BOARD NO. (40)
FEB 26 1951
850 Flatbush Avenue
Brooklyn 26, N. Y.

Subject: Harry C. Nugent
SS No. 50 40 29 474

DEAR SIRs:

This has reference to your letter dated February 16, 1951 requesting information as to whether the Associated Bible Students Organization which sponsors the above registrant's claim as a conscientious objector is recognized.

The records at this Headquarters disclose that under date of January 8, 1949, we received a letter from the above organization which is quoted for your information and guidance:

"The following resolution was adopted by the independent congregation of Associated Bible Students, meeting at 104 Clark St., Brooklyn, N. Y. on November 14, 1948:—

"Resolved that our position relative to the Selective Training and Service Act of 1940 is also our position relative to the Selective Service Act of 1948; and that we hereby again go on record with the proper governmental authorities and declare:

65 "That as Consecrated Christians, "obedient to the powers that be"; insofar as such obedience does not conflict with the teachings of the Bible, particularly as expressed in the words of Jesus and his Apostles, which we understand to be against the Christian's participation in war:

"We do hereby request that those of us who conscientiously feel bound to refuse military service of any description, be exempted as

conscientious objectors from such training as provided for in section 6(j) of the Selective Service Act of 1948.

"Respectfully submitted,

ASSOCIATED BIBLE STUDENTS,
104 Clark St., Brooklyn, N. Y.

(S.) MICHAEL J. KELLY,

Secretary.

"Signatures of Elders of Congregation

Pantel Hatgis
Arthur Krumpolt
W. J. Hollister
L. H. Nobby
W. N. Woodworth
Ludlow P. Loomis
Roy E. Mitchell
Martin C. Mitchell
Fred Mundell
Henry E. Anderson
Felix S. Wassermann
Fred Bright"

For the New York City Director

PAUL AKST

Major, USAF,

Chief, Manpower & Operations Division.

Series of Papers, of Which Report of Hearing Officer and Letter of Special Assistant to Attorney General Are Printed

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REPORT OF HEARING OFFICER OF THE DEPARTMENT OF JUSTICE
PURSUANT TO SECTION 6 (J) OF THE SELECTIVE SERVICE ACT OF
1948

In re: Harry Gray Nugent—Conscientious Objector. S. S. No.
50-40-29-474.

Appeal from:

Local Board No. 40—(44 Court Street, Brooklyn, N. Y.)

Appeal Board Panel #2.

United States Attorney
Eastern District of New York:

HONORABLE FRANK J. PARKER.

Hearing Officer:

THOMAS O'ROURKE GALLAGHER, Esq.

STATEMENT

The registrant, HARRY GRAY NUGENT, of #1650 Ocean Parkway, Brooklyn, New York, was born in Manhattan, New York City, on August 4, 1929, and at present he lives with and assists his father, the latter being superintendent of the building above mentioned on Ocean Parkway. The registrant claims he and his parents are Associate Bible Students, located at #104 Clark Street, Brooklyn, where they rent space from the Swedenborg Church, and now claims to be a Conscientious Objector.

In his Questionnaire under Statement re Classification, registrant stated: "Do to religious beliefs I will only serve as a non-combatant" (spelling his).

For a young man who had one and one-half years of High School, he is exceedingly illiterate. His spelling is inexcusable.

The Associated Bible Students, of which registrant claims to be a member, is a group which broke away from Jehovah's Witnesses, when Pastor Russell died in 1919. This death, of course, occurred ten years before the birth of this registrant.

Apparently each member is entitled to his own belief. Registrant's belief seems to be a free and particularly easy belief and religion, calling for little effort and practically no sacrifice.

As to his sincerity, the references he produced failed to make favorable impression, and most of them were conscientious objectors themselves or members of the same Bible Society.

From the impressions gleaned as to this registrant, he is apparently shiftless, lazy, somewhat of a moral weakling—has unusual motion in walking, talking and other mannerisms which give him the appearance of being somewhat if not definitely effeminate.

In all events, this registrant definitely has not qualified as a Conscientious Objector as to church affiliations, religious beliefs, or any statements or affirmative actions which were attested to by anyone on his behalf, made prior to the national emergency, and it is believed that his present claims are not founded on truth in fact.

The registrant, in my opinion, has failed totally to sustain his claim for total deferment as a Conscientious Objector. I believe he should be classified 1-A.

However, his Local Draft Board put him in 1-A-O on his own statement on page 7 of his classification questionnaire, to wit: "Do to religious beliefs I will only serve as a noncombatant" (spelling that of registrant).

Your Hearing Officer will follow this ruling of Local Draft Board.

RECOMMENDATION

That Registrant be retained in Class 1-A-O.

Respectfully submitted,

(S.) THOMAS O'ROURKE GALLAGHER,
Hearing Officer.

Dated December 6, 1951.

68 WASHINGTON, D. C.

January 24, 1952.

Chairman, Appeal Board; New York City,
Eastern District of New York,
Selective Service System,
44 Court Street,
Brooklyn 2, New York.

Re: Harry Gray Nugent
Selective Service No.
50-40-29-474
Local Board No. 40
Brooklyn, New York.

DEAR SIR:

After review of the entire file and record, the Department of Justice recommends to your Board that the appeal in the above mentioned case, so far as it concerns the question of conscientious objection to participation in war, be sustained as to combatant military service only, and the registrant if inducted into the land or naval forces be assigned to noncombatant duties.

As required by Section 6(j) of the Universal Military Training and Service Act, an inquiry was made in this case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Honorable Thomas O'Rourke Gallagher, Hearing Officer for the Southern and Eastern Districts of New York. His report and a copy of the transcript of hearing are enclosed. There is also returned the Selective Service Cover Sheet in the above case.

69 The investigative report shows that the registrant is a religious person and attends church regularly. There is some indication in the report that the registrant is inclined to be lacking in ambition, however, his employment record is satisfactory. A number of persons interviewed, not members of the sect to which the registrant belongs, indicated that the registrant is a courteous, quiet, sober individual, who is sincerely interested in his religion. Registrant's claim for exemption from noncombatant service is not sustained because he failed to establish that because of his religious training and belief he is conscientiously opposed to participation in training and service in a noncombatant capacity. In this connection, attention is also invited to the registrant's statement regarding his classification, which appears on his SSS Form No. 100.

Sincerely,

T. OSCAR SMITH,
Special Assistant to the Attorney General.

70 GOVERNMENT'S EXHIBIT 2-L

NEW YORK CITY HEADQUARTERS

SELECTIVE SERVICE SYSTEM

205 East Forty-Second Street
New York 17, N. Y.

February 12, 1952

Refer to File

10:kh

Selective Service System

LOCAL BOARD No. (40)

FEB. 13, 1952

850 Flatbush Avenue
Brooklyn 26, N. Y.Mr. Harry Gray Nugent,
83-33 Austin Street,
Kew Gardens, New York.

SS No. 50-40-29-474

DEAR MR. NUGENT:

This will acknowledge receipt of your Special Delivery letter dated February 9th, which arrived this morning.

I have been over your file and feel it would serve no useful purpose for me to interview you. You have been granted all your procedural rights and your order for induction must stand.

Sincerely yours,

CANDLER COBB,
New York City Director.

CC:L.B. 40.

71 GOVERNMENT'S EXHIBIT 3

Photostat Letter

February 9, 1952.

Colonel Cobb,
United States Army,
Selective Service Division.

DEAR SIR:

I was advised by your secretary, the best way of contacting you, would be through the mail.

I called your office, on the eighth of this month, to inquire of the possibility of my having a personal interview with you. The rea-

son I desired this interview is, I am a Conscientious Objector, and I am due for induction on the twenty first of this month.

I felt, if I had the opportunity of seeing you personally, you would understand why I believe my case is worthy of your consideration.

I have held the classification of 1A-O since Feb. 5th, 1951, and have now received a new classification card on Feb. 6th, 1952 with the same classification. In Feb. 1951, I appeared before my local board, number 40, for a Hearing, to change my classification from 1-A, to 4-E. The local board did not grant me a 4-E classification, but they did reclassify me to 1A-O.

Why I believe they would not grant me a 4-E classification, (which I now understand has been changed to 1-O) was because in 1948 when I received my first questionnaire, after I registered, on that questionnaire, I requested the conscientious Objectors Form, and I stated I was willing to take noncombatant service. At that time I was sincere in believing that noncombatant service, would not conflict with the religious teachings, I then understood,

72 Though I was raised in my religion, and though my great grand parents, and grandparents, held to the same beliefs that I hold to to-day, I did not take any studious interest or consecrate my life to my Heavenly Father, until about three years before I received my first questionnaire.

After I sent in my first questionnaire in 1948, I did not receive my conscientious Objectors Form, until after the outbreak of the Korean conflict. A good time elapsed between the mailing of my first Form, and the Korean Police action. A good amount of time also, for me to further my studies in the scriptures, and to learn more of what God expects of His children who claim consecration to Him.

Quite some time before I received my conscientious Objectors Form, I realized that I no longer could, in sincerity, maintain the position I took as far as noncombatant service was concerned. For my studies in the scriptures revealed to me, that the position I had taken would not be in accordance with the teachings of Christ of whom I wish to be a footstep follower.

When I finally received my Conscientious Form, and asked for a 4-E classification, when formally I said I would accept noncombatant service, and with the Korean battle in full swing, my request may have appeared a bit ambiguous.

Perhaps the members of my local board, failed to grasp the fact that my faith and knowledge, is progressive, for it is stated in Isaiah 28:10th verse, "For precept must be upon precept, precept upon precept, line upon line, line upon line, here a little, there a little." The apostle Peter also shows that the christian faith is not static but progressive when he states in 2nd Peter 5:7 "And besides this, giving all diligence, add to your faith, virtue, and to virtue knowledge. And to Godliness, brotherly kindness, charity."

And so my faith is progressive, and as my knowledge increases my responsibility to God increases, and my conscience could not allow me to do the things I might have done when my knowledge was less.

When my local board rejected my A-E request, I then appealed to the Appeal board.

On July 18th, 1951, I received my notice of Hearing, and also instructions to registrants whose claims for exemption as conscientious objectors have been appealed. In the instructions, I was informed, that "Upon request therefor, by the registrant, at any time after receipt by him, of the notice of Hearing and Hearing officer, will advise the registrant, as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat the claim of the registrant, such request being granted to enable the registrant more fully to prepare to answer and refute at the Hearing, such unfavorable evidence." I took advantage of this clause and visited the office of Mr. Thomas O'Rourke Gallagher who was my Hearing officer. When I arrived at his office I was informed by his secretary, that he was away on a vacation. I then told his secretary that I came to find out if there was any evidence that Mr. Gallagher may have in his possession which would tend to defeat my appeal for 4-E classification. His secretary informed me, that all of the information gathered by the F.B.I. on my case, was very favorable and that I should have no trouble in obtaining my desired classification. In my instruction Form, it was also stipulated, that I could bring an advisor. Mr. Gallaghers secretary informed me that that, would not be necessary because of the evidence in my favor. I reported for the Hearing, on July 17, 1951. It was on my instruction sheet that my hearing would be of a non-legalistic nature. I appeared before Mr. Gallagher. He had me swear to tell the whole truth and nothing but the truth. I am not adverse to swearing to tell the truth, but it did not appear to me to be non-legalistic. On my instruction sheet I was informed that I would be permitted to a full and complete presentation of my claim. This I was not permitted to do. I had to answer all Mr. Gallaghers questions with Yes. or No. The only exception to this, was at the beginning of my Hearing, and then I was allowed to say very little. Mr. Gallaghers Stenographer, recorded with pencil, all that was supposed to have been said. But there were many more questions Mr. Gallagher asked me, that required more than one word reply, and generally if my reply did exceed more than one or two words, he would have his stenographer strike it from the record. In this Hearing, I feel that I was not allowed to give a full presentation of my claims.

I do not know just why Mr. Gallagher refused to give me a 4E classification. If there were any adverse evidence to defeat my

claims, then I feel that I should have been informed of it when I visited his secretary.

I feel that this Hearing was not a fair one, and so I write to you Sir, in hopes that you may consider my case and bring it to the attention of the State Authorities.

The vote of my local board was three to nothing against me. Though the decision of the board is against me, it does not alter my convictions in any way.

You see Sir, I am sincerely trying to obey my Lords Commandments that were given to us in the Sermon On The Mount. I must obey His commandments no matter what the consequences may be.

My religious affiliations are with the Associated Bible Students. We meet Sundays at 104 Clark Street, Brooklyn, N. Y. where my Father is a Deacon. We also meet in the homes of the Bible Students, during the week. I try to attend most all of these meetings.

In my files you will find a more detailed account of what Scriptures I base my conscientious objections to participation in the Armed Services. I am also inclosing a document on which I have based some of my conclusions.

My Selective number is 50-40-29-474.

75 My Local Board number is (40) 850 Flatbush Ave., Brooklyn.

Thanking you for your kind attention,

I am respectfully yours,

HARRY GRAY NUGENT.

Harry Gray Nugent

83-33 Austin Street

Kew Gardens, N. Y.

Quotation from Zion's Watch Tower, September 1, 1915

CHRISTIAN DUTY AND THE WAR

In Scripture Studies, Vol. VI, we have set forth a suggestion that the followers of Christ seek by every proper means to avoid participation in war. We there suggested the possibility, but that in the event of conscription the Lord's followers should use all their influence toward obtaining positions in the Hospital Corps or in the Provision Department of the army, rather than in the actual warfare. We suggested further that if it were impossible to avoid going into the trenches, it would still not be necessary to violate the divine requirement, "Thou shalt do no murder."—Matthew 19:18.

We have been wondering since if the course we have suggested is the best one. We wonder if such a course would not mean com-

promise. We reflect that to become a member of the army and to put on the military uniform implies the duties and obligations of a soldier as recognized and accepted. A protest made to an officer would be insignificant—the public in general would not know of it. Would not the Christian be really out of his place under such conditions?

76 "But," some one replies, "If one were to refuse the uniform and the military service he would be shot."

We reply that if the presentation were properly made there might be some kind of exoneration; but if not, would it be any worse to be shot because of loyalty to the Prince of Peace and refusal to disobey his order than to be shot while under the banner of these earthly kings and apparently giving them support and, in appearance at least, compromising the teachings of our heavenly King? Of the two deaths we would prefer the former—prefer to die because of faithfulness to our heavenly King. Certainly the one dying for his loyalty to the principles of the Lord's teachings would accomplish far more by his death than would the one dying in the trenches. We cannot tell how great the influence would be for peace, for righteousness, for God, if a few hundred of the Lord's faithful were to follow the course of Shadrach, Meshach, and Abednego, and refuse to bow down to the god of war. Like those noble men they might say, "Our God is able to deliver us, if he chooses so to do; but if he does not choose to deliver us, that will not alter our course. We will serve him and follow his direction; come what may."

Those Hebrews of the past cast into the fiery furnace because of their faithfulness to God, but afterwards delivered, are a noble example. Indeed, the millions of soldiers enduring terrible privations through loyalty to earthly kings during the present great war are wonderful examples and illustrations. May not the soldiers of Christ well say to themselves, "If the ancient worthies knew God only partially, yet were so faithful to Him, and if these earthly soldiers are so faithful to earthly kings, what manner of persons ought we to be who have come into the family of God by the spirit of begetting, who have entered the school of Christ, who are being guided and led by the Captain of our Salvation, and who have his exceeding great and precious promises in respect to our

77 eternal future! How should we stand for him and for his teachings? Could we lay down our lives in a better way than by faithfulness to the King of kings and Lord of lords, our redeemer and Head?"

We are not urging this course; We are merely suggesting it. The responsibility fully belongs with each individual. We are discharging our responsibility toward many Bible students who are inquiring of us respecting the mind of the Lord on this subject. We gave them our best thought previously, but now fear that we were too

conservative. We always advocate conservatism, in the sense of not rushing into difficulties simply because they are difficulties and would mean trouble. But we do advocate that, while seeking to avoid trouble and to live peaceably with all men, where duty calls, or danger; we should not be wanting there.

(Written in 1915)

DEFENDANT'S EXHIBIT "A"

OFFICE OF THE ATTORNEY GENERAL

INSTRUCTIONS TO REGISTRANTS WHOSE CLAIMS FOR EXEMPTION AS CONSCIENTIOUS OBJECTORS HAVE BEEN APPEALED

2. Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing office will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence.

78 3. At the hearing by the hearing officer of the Department of Justice, the registrant will be permitted to make a full and complete presentation of his claim. He may bring with him to the hearing as witnesses any persons who have personal knowledge of facts concerning his religious training and belief and concerning the character and good faith of his objections to participation in war in any form.

5. The hearing will not be in the nature of a trial of judicial proceeding, but will be informal and non-legalistic. Registrants will not be required to adhere to the ordinary rules of evidence. It will not be necessary for the registrant to be represented at the hearing by an attorney. The registrant may bring with him a relative or friend or other adviser, who may sit with him at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions or make any argument concerning any evidence or any phase of the proceeding. The hearing will at all times be under the direction and control of a duly designated hearing officer, who may terminate the proceeding upon the violation of these instructions by the registrant or his adviser.

79 In United States District Court for the Southern District of
New York

No. 37/349

UNITED STATES OF AMERICA

v.

HARRY GRAY NUGENT

JUDGMENT AND COMMITMENT—Filed April 21, 1952

On this 21st day of April, 1952 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a finding of guilty by the Court (Jury waived) of the offense of unlawfully failing and neglecting to take one step forward; after it had been determined that he was fully qualified for induction into the armed forces of the United States. Title 50 App. Sec. 462 U. S. Code as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two and one-half years.

80 IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDWARD WEINFELD,
United States District Judge.

Clerk.

In United States District Court

[Title omitted]

NOTICE OF APPEAL—Filed April 25, 1952

Harry Gray Nugent, the above named defendant, hereby appeals to the Court of Appeals for the Second Circuit from a judgment entered by this Court on the 21st day of April 1952, committing the defendant to the custody of the Attorney General for a period of

two and one-half years, as a result of a conviction for the offense of refusing to take one step forward for induction into the armed forces of the United States in violation of 50 U. S. C. 462.

Dated April 25, 1952.

HERMAN ADLERSTEIN,
Attorney for Defendant,
79 Wall Street,
New York 5, N. Y.

In United States District Court

[Title omitted]

STIPULATION AS TO CONTENTS OF THE RECORD ON APPEAL—May 29,
1952

The appellant herein and his counsel have represented and hereby represent to the appellee:

(1) That this transcript of the record contains all matter necessary fairly to present their points and such points as are relevant in reply.

(2) That in so far as the transcript of record purports to contain the stenographic minutes of proceedings, the minutes are set forth accurately, and omissions, if any, are clearly marked. Such omissions are only of matter wholly immaterial to any question raised on this appeal.

82 (3) That all exhibits are accurately reprinted, except those specified, namely:

Government's Exhibits.

2a—only page three printed.

2C, 2D, 2E, 2G, 2I, 2J (that part of which are the minutes of Hearing before T. O'R. Gallagher) 2K.

Defendant's Exhibit.

Omitted, except clauses 2, 3, & 5 and heading.

And that the above exhibits are omitted, except as specified.

(4) That the transcript of the record contains all matters required to be set forth by applicable rules.

In reliance upon these representations it is hereby stipulated and agreed by the undersigned that the foregoing is a true copy of the transcript of record of the District Court for the Southern District of New York in the above entitled matter as agreed on by the parties, and further, that all the exhibits pertaining to this cause not reproduced herein, may be submitted to the Court upon the argu-

ment of the appeal, with the same force and effect as if reproduced herein and, further, if it should appear to the appellee that matter properly a part of the transcript of record has been omitted and has become material, despite the representations herein made, the appellee may, at its option, reprint such matter as an appendix to its brief or may require the appellant to reprint such matter, and use such matter with the same force and effect as if reproduced herein.

Dated May 20, 1952.

MYLES J. LANE,

United States Attorney,

Attorney for Plaintiff-Appellee.

HERMAN ADLERSTEIN,

Attorney for Defendant-Appellant.

83 Clerk's Certificate to foregoing transcript omitted in printing.

84 In United States Court of Appeals for the Second Circuit,
October Term, 1952

No. 28

Argued October 7, 1952

Docket No. 22385

UNITED STATES OF AMERICA, APPELLEE

v.

HARRY GRAY NUGENT, APPELLANT

Before THOMAS W. SWAN, *Chief Judge*, and L. HAND and FRANK,
Circuit Judges

Appeal from a judgment of conviction by the United States District Court for the Southern District of New York, Weinfeld, *Judge*.
REVERSED.

MYLES J. LANE (Daniel H. Greenberg, of counsel), *for appellee*;
HERMAN ADLERSTEIN, *for appellant*.

OPINION—Decided November 10, 1952

85 Answering a questionnaire sent him by his local draft board, defendant stated that he was a conscientious objector but would accept non-combatant service. Some twenty months later, in a form sent him by that board, he first stated that he could no longer accept non-combatant service because of the progress

of his religious beliefs. The local board originally classified him I-A; but, when he filed the second form, and after a hearing before the board, it classified him I-A-O.¹ He appealed. Pursuant to the statute and regulations, the Appeal Board referred the defendant's claim to the Department of Justice for inquiry and hearing. After an inquiry, the F.B.I. made a report. Subsequently, Gallagher, a hearing officer for the Department of Justice, held a hearing at which defendant appeared and was questioned. At this hearing, Gallagher did not refer to the F.B.I. report or any of its contents. He made a report and recommended that the defendant "be retained in Class I-A-O." Smith, a Special Assistant to the Attorney General, after reviewing the "entire file and record," recommended that defendant's claim for exemption from non-combatant service be denied.^{1a} The Appeal Board having before it the Selective Service file, including the recommendations and reports of Gallagher and Smith, voted to continue defendant's classification in Class I-A-O.^{1b} He was subsequently ordered to report for induction as a non-combatant. He reported, completed his physical examination, and, when found acceptable, refused to take the symbolic "one step forward" which would have constituted his induction into the armed forces. He was then arrested and indicted for violation of 50 U. S. C. (1946 ed. Supp. III) § 462.

Section 451 of this Act reads in part: "(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 456(j) reads in part: "Nothing contained in this title shall be construed to require any person to be subject to combatant

¹ Under the Regulations, this class includes every registrant who would have been classified in Class 1-A (available for military service) but for the reason that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

^{1a} In his original brief, defendant argued that Smith had not seen the FBI report. Smith's report to the Appeal Board says, "The investigative report shows * * *". The government in its brief argues that this means that Smith had before him the FBI report. Defendant in his reply brief says, "If the report of * * * Smith meant to refer to the FBI report, when it mentioned the investigative report, then appellant withdraws that point. * * *". We think it did mean to refer to the FBI report.

^{1b} It is not clear that the FBI report was before the Appeal Board.

^{1c} 50 U. S. C. (1946 ed. Supp. V).

training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * *

Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The

Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service, as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board * * * [to] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. * * * If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

Pertinent parts of the Regulations—32 CFR (1951 Rev. ed.) § 1626.25—read as follows:

"(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action: * * *

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the 'Minutes of Action By Local Board and Appeal Board' on the 'Classification Questionnaire' (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in paragraph (a) (2) or (4) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrants. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. * * *

89 FRANK, Circuit Judge:

At the hearing held by the hearing officer, he did not mention the F. B. I. investigative report; nor did he give a summary of its contents or reveal the names of the persons who supplied the data described in the report. After defendant's indictment, before and at the trial the prosecutor refused to produce that report, on the ground that it was "confidential." See *U. S. ex rel. Tainy v. Ragen*, 340 U. S. 462.¹ When a prosecutor thus withholds such matter, the government must take the consequences,² which here come to this: Not having access to the report, the trial court and this court must

¹ *U. S. ex rel. Bowman Dairy Co. v. U. S.*, 341 U. S. 214.

² See *U. S. v. Andolschek*, 142 F. (2d) 503, 506 (C. A. 2); *U. S. v. Krulewitch*, 145 F. (2d) 76, 78-79 (C. A. 2); *U. S. v. Beckman*, 155 F. (2d) 580, 584 (C. A. 2); *U. S. v. Grayson*, 166 F. (2d) 863, 870 (C. A. 2).

assume that it contained matter gravely adverse to the defendant.³ To be sure, the defendant did not make a request, pursuant to the following provision contained in the "Instructions" issued by the Office of the Attorney General: "Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant, such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence." But even if defendant had made the request, the divulged information would not have afforded him adequate opportunity "to prepare to answer and refute at the hearing such unfavorable evidence." For that information would not have disclosed the identity of the witnesses who gave such "evidence," and thus would not have put defendant in position to interrogate or impeach those witnesses.

Accordingly, we think the hearing before the hearing officer violated the statute, for the reasons admirably stated by Judge Hincks in *United States v. Geyer*, F. Supp. . . . Referring to § 456(j),^{4a} which provides that on an appeal by a registrant claiming classification as a conscientious objector, the "Department of Justice after appropriate inquiry shall hold a hearing" upon notice to the registrant, Judge Hincks said: "The natural import of this provision is, I think, that the investigative report resulting from the inquiry shall be made a part of the record for consideration by all directly concerned with the classification. Under the contemplated procedure the registrant has already had an opportunity before the draft board to put everything desired into the record. That being so there would be no point to notify him to appear in the departmental hearing just to put in more evidence. Thus, by elimination, the only useful purpose of notice at that stage was to give the registrant opportunity to meet the contents of the report. And if such was the underlying purpose, the inference is required that the Act envisaged that the investigative report should be made a part of the departmental report and go forward in its entirety for

³ Smith, the Special Assistant to the Attorney General, in his letter to the Appeal Board, stated that "there is some indication in the [F. B. I.] report that the registrant is inclined to be lacking in ambition, however, his employment record is satisfactory." It may be that far more damaging statements are contained in the F. B. I. report.

⁴ It is entitled, "Instructions to Registrants Whose Claims For Exemption As Conscientious Objectors Have Been Appealed."

^{4a} 50 U. S. C. (1946 ed. Supp. V).

the appeal board to scan and evaluate. Furthermore, the Act (same section) provides that the board 'shall in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department. * * *'. This clearly imports that the

board shall evaluate the worth of the recommendation which
94 is a task impossible of fulfillment unless the board has access to the entire record on which the recommendation is based.

Congress was not using empty words when in Sec. 451 of the Act it solemnly declared 'that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.' A system in which selections might be made in uninformed reliance upon the recommendation of an executive officer bottomed perhaps on secret police reports, would indeed make a mockery of that high declaration of policy. Only if the Act be construed to require that the investigative reports shall become a part of the record open to the appeal board and all concerned is the 'system of selection—just and fair' within our Anglo-Saxon concepts of justice and due process."⁵

It is true that in the *Geyer* case the Appeal Board's request for the FBI report was refused by the Assistant Attorney General. However, Judge Hincks, having referred to the fact that "the defendant at no stage had seen the report" although the defendant had never asked for it, said that the statute must be construed to require that the investigative reports shall become part of the record open to the appeal board and all concerned, thus obviously including the defendant.

Because, as Judge Hincks points out, the statute calls for a hearing "after appropriate inquiry," we think that it was essential that the FBI report, which results from that inquiry, should have been disclosed to the defendant before or at that hearing held by the
92 hearing officer. Since he was a layman not represented by a lawyer, it is of no significance that he did not ask for the report. Nor is it significant that he did not ask the hearing officer to advise him, pursuant to the "Instructions," concerning "the general nature and character of any evidence * * * unfavorable" to his claim, for, to repeat, such advice would not have put him in a position to interrogate or impeach the witnesses who gave such testimony. We are not to be understood as deciding whether, if the statute provided that such a report should not be disclosed, it would

⁵ In *United States v. Geyer*, as here, the defendant had not asked to see the F. B. I. report at or before the hearing held by the hearing officer.

be unconstitutional. Cf. *Imboden v. United States*, 194 F. (2d) 508, 513 (C. A. 6).

Even if the F. B. I. report were favorable to the defendant, it may well be that the statute required that it be disclosed to him at or before the hearing held by the hearing officer. Cf. *Griffin v. United States*, 183 F. (2d) 990, 993 (App. D. C.), where the court said that "the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense."⁶ True, the hearing here was not a criminal trial. But its effects on defendant might be fully as important.

We deem it appropriate to quote, as apposite here, Judge Hinck's closing remarks in *Geyer's* case: "While, of course, the verdict of acquittal is a final determination of the pending charge based, as I hold, on an illegal classification, nothing in the Constitution or the Act precludes further proceedings under the Selective Service System or a successful prosecution for refusal to comply with an order for induction based upon another, and valid, order of classification, if any such shall be made."

REVERSED.

93 In United States Court of Appeals for the Second Circuit

UNITED STATES, PLAINTIFF-APPELLEE,

v.

HARRY GRAY NUGENT, DEFENDANT-APPELLANT

JUDGMENT—Filed November 10, 1952.

Appeal from the United States District Court for the Southern
District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

By A. DANIEL FUSARO,
Deputy Clerk.

⁶ Cf. *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382, 387 (D. C. Ill.).

64 UNITED STATES OF AMERICA VS. HARRY GRAY NUGENT

94 [File endorsement omitted.]

95-96 Clerk's Certificate to foregoing transcript, omitted in printing.

97-98 [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI
—Filed December 5, 1952

Upon consideration of the application of counsel for petitioner, It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 9, 1953.

ROBERT H. JACKSON,
*Associate Justice of the Supreme
Court of the United States.*

Dated this 5th day of December, 1952.

99 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

[Title omitted]

No. 540

ORDER ALLOWING CERTIORARI—Filed March 16, 1953

The petition herein for a writ of Certiorari to the United States Court of Appeals for the Second Circuit is granted, and case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 573

UNITED STATES OF AMERICA, PETITIONER

LESTER PACKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 25, 1953
CERTIORARI GRANTED MARCH 13, 1953

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. —

UNITED STATES OF AMERICA, PETITIONER,

VS.

LESTER PACKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 United States District Court, Southern District
of New York

UNITED STATES OF AMERICA, PLAINTIFF

against

LESTER PACKER, DEFENDANT

STATEMENT UNDER RULE 15 (b)

1. This criminal proceeding was commenced on the 19th day of November 1951 by filing of an Indictment.

2. The Plaintiff is United States of America.

3. The Defendant is Lester Packer.

There has been no change of parties.

4. Defendant pleaded not guilty on November 27, 1951.

5. Defendant was arrested November 5, 1951.

6. Bail of \$1,000. was taken before a U. S. Commissioner upon arrest and was renewed November 27, 1951 by the Court and continued until date of sentence.

7. The trial took place March 26, 1952.

8. Judgment was entered April 2, 1952.

9. Notice of Appeal was filed April 9, 1952.

10. Defendant was tried before Judge McGohey who on April 2, 1952 sentenced defendant to 4 years for violation of the 1948 draft Act. Defendant claimed he was a Conscientious Objector to war.

2 United States District Court, Southern District of New York

[Title omitted]

INDICTMENT

The Grand Jury charges:

1. On or about the 5th day of November, 1951, at the Southern District of New York, LESTER PACKER, the defendant did unlawfully and knowingly fail and neglect to perform a duty required of him under and in execution of the Universal Military Training and Service Act, and the Rules and Regulations duly made pursuant thereto, in that at the time and place aforesaid, the defendant did fail and neglect to take one step forward, after it had been determined that the defendant was fully qualified for induction, and which would have constituted the defendants' induction into the

Armed Forces of the United States (Title 50, Appendix, Section 462, United States Code).

A TRUE BILL.

B. BARTON,
Foreman.

Plea of Not Guilty, November 27, 1951—Defendant pleads Not Guilty.

MYLES J. LANE,
United States Attorney.

3

In United States District Court

AFFIDAVIT AND NOTICE OF MOTION TO INSPECT F. B. I. REPORT
January 2, 1952

SIR:

PLEASE TAKE NOTICE that upon the indictment, the plea of not guilty, the annexed affidavits of Lester Packer and Herman Adlerstein, both duly verified the 31st day of December 1951, and upon all previous proceedings had herein, the undersigned will move this Court, to be held in Room 318 in the United States Court House, Foley Square, New York, N. Y., on the 7th day of January 1952 at 10:30 in the forenoon, or as soon thereafter as counsel can be heard, for an Order directing Edward Scheidt, Agent in charge of the New York Office of the Federal Bureau of Investigation, to produce for examination, inspection, and copying the Report of the Federal Bureau of Investigation, which was submitted to and used by Jackson A. Dykman, Hearing Officer, in the investigation and determination of the classification of defendant, pursuant to the Selective Service and Training Act of 1948, upon his appeal from the classification of the Local Board, and that said Report of the Federal Bureau of Investigation, having been subpoenaed, be produced for examination, inspection, and copying in the Office of the United States Attorney before trial, or at such other place, and at such time as may be fixed by the Court, and for such other and further relief, as to the Court may seem just and proper.

Dated New York, January 2, 1952.

Yours etc.,

HERMAN ADLERSTEIN,
Attorney for Defendant,
Address:

To: MYLES LANE,
United States Attorney.

4

In United States District Court

AFFIDAVITS IN SUPPORT OF MOTIONS

STATE OF NEW YORK,

County of Kings, ss:

LESTER PACKER, being duly sworn, deposes and says that he is the defendant herein; that he is charged with a violation of the Selective Service Act of 1948, in that he refused to take one step forward for purposes of induction.

That defendant has caused a subpoena duces tecum to be served on the Federal Bureau of Investigation in New York, for the purpose of producing a Report it made to Hon. Jackson A. Dykman, Hearing Officer, and used by said Hearing Officer, in making his Report for the purposes of classification.

That defendant is a Conscientious Objector to war, and he claims that he was improperly classified and should have been classified 4-E instead of 1-A; that the Report of the Hearing Officer has made a wrong conclusion, arbitrarily and without basis, that defendant could not have derived his opposition to war from the Hebrew Religion, although the Report of the Hearing Officer states that defendant was trained in his early years in the Hebrew Religion.

That the Hearing Officer cites the Report made by the F. B. I. after its investigation of defendant, and that the Report of the Hearing Officer indicates that there is material evidence in the F. B. I. Report, which will aid the defense herein, to show that he was a sincere objector to war, and that this stemmed from Religious Training and Belief.

That the matter contained in the F. B. I. report is necessary to prove defendant's case, in which he will show thru said F. B. I. Report that he should have been classified in 4-E and not in 1-A, and that, therefore, said F. B. I. Report becomes necessary and material to defendant's case.

That said F. B. I. Report was not included in defendant's cover sheet by the Local Draft Board, and that, for that reason, defendant has not been able to see said F. B. I. Report in aid of his preparation for trial.

That, under the Draft Regulations, the said F. B. I. Report should have been included in the defendant's cover sheet by the Local Board, as there is a provision that all papers used for classifying purposes shall be put into a registrant's cover sheet; that the omission of this Report from the cover sheet makes it necessary to examine the said Report before the trial herein.

WHEREFORE defendant respectfully requests that this Court grant an Order directing that the Report of the Federal Bureau of Investi-

gation, used before Jackson A. Dykman, the Hearing Officer, for the purpose of determining the proper classification of defendant pursuant to the Selective Service Act of 1948, be produced for inspection and copy, before the trial herein, at the office of the United States Attorney, or at such other place, as the Court may direct, and for such other and further relief, as to the Court may seem just and proper.

Sworn to December 31, 1951.

LESTER PACKER,
(Signed) Lester Packer.

6

In United States District Court

AFFIDAVITS CONTINUED

STATE OF NEW YORK,
County of New York, ss:

HERMAN ADLERSTEIN, being duly sworn, deposes and says that he is an Attorney for the Defendant herein.

That defendant is charged with a Selective Service Violation and has pleaded "not guilty".

That defendant contends that he was not properly classified, and that he should have been put in 4-E.

Defendant expects to show that the conclusions of Jackson A. Dykman, Hearing Officer, who recommended the 1-A classification of defendant, was arbitrary, without basis in fact, and contrary to the evidence and religion of defendant.

That it is necessary and material to examine the Report of the F. B. I. made to classify defendant, as there is matter in said Report, which should help defendant at the trial, according to the references contained in the Report of the Hearing Officer.

That a subpoena duces tecum has been served on the New York Office of the F. B. I. to produce said Report at the trial, and a motion is pending to quash said subpoena.

That this motion is made pursuant to Rule 17(C) which permits inspection before trial.

That said F. B. I. Report is not otherwise available to defendant, as it has been omitted from defendant's cover sheet by the Draft Board, altho it was used in his classification.

That no previous application has been made for this or similar relief, and that, in order to advance the cause of justice in this case, the said Report of the F.B.I. should be produced at the trial, in aid of the defense.

WHEREFORE, it is respectfully requested that the application of defendant for the production and inspection of the F. B. I. Report herein before trial be granted:

Sworn to December 31, 1951.

HERMAN ADLERSTEIN.

In United States District Court

ORDER TO SHOW CAUSE—December 14, 1951

Upon the annexed affidavit of Louis Grossman, Assistant United States Attorney, verified the 14th day of December 1951, and upon the indictment filed herein, let the defendant, Lester Packer, or his attorney, Herman Adlerstein, show cause at a term of this court, Room 318, United States Court House, Foley Square, New York, New York, on the 17th day of December 1951 at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made herein quashing the subpoena served on December 13, 1951 upon Edward Scheidt, Agent in Charge of the New York Office of the Federal Bureau of Investigation, requiring the production of a certain report, and for such other and further relief as to this Court may seem just and proper.

Sufficient reason appearing therefor, let service of a copy of this order to show cause, together with a copy of the annexed affidavit, on the attorney for the defendant, on or before 6:00 P. M.,
8 December 14, 1951, be deemed sufficient service.

Dated: New York, N. Y. December 14, 1951.

DAVID N. EDELSTEIN,
U. S. D. J.

In United States District Court

AFFIDAVIT SUBMITTED WITH ORDER TO SHOW CAUSE

STATE OF NEW YORK, County of New York,
Southern District of New York, ss:

LOUIS GROSSMAN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York, and am familiar with the above entitled action.

2. An indictment was filed herein charging the above named defendant, Lester Packer, with failing to take one step forward, which would have constituted his induction into the armed forces of the

United States, in violation of Title 50, Appendix, Section 462, United States Code. This case has been tentatively set for trial on December 17, 1951.

3. On December 13, 1951 Edward Scheidt, Agent in Charge of the New York Office of the Federal Bureau of Investigation, was served with a subpoena duces tecum in the above named action, which subpoena directed that he produce the report made by the Federal Bureau of Investigation to the Department of Justice in the matter of the appeal and classification of Lester Packer, the above named defendant. A copy of said subpoena is annexed hereto and marked Exhibit A.

9 4. At the request of the above named defendant, his entire file was made available to his counsel. Said file contains all the papers which he is entitled to have under the Selective Service Act of 1948.

5. The FBI report sought by the defendant herein is confidential and cannot be produced as requested, pursuant to Attorney General's Order No. 3229, issued under the authority of Title 5, United States Code, Section 22.

6. Since the trial of this action, now scheduled for December 17, 1951, will be adjourned for a short period of time until the determination of this application, no injury will result to the defendant by the granting of this order to show cause.

7. An order to show cause is sought at this time rather than a regular notice of motion due to the fact that time does not permit the service of such a motion.

No previous application for this or similar relief has been made in the premises to this court.

Sworn to December 14, 1951.

LOUIS GROSSMAN.

EXHIBIT A TO AFFIDAVIT

The President of the United States of America

To Edward Scheidt, Agent in Charge of the New York Office of the Federal Bureau of Investigation.

(L. S.)

Greeting:

We command you, that all business and excuses being laid aside you appear and attend before Hon. Samuel H. Kaufman, Judge of the United States District Court, in room 318 of the Federal Building at Foley Square, New York, N. Y. on the 17th day of December 1951 at 10:30 o'clock in the forenoon to testify and give evidence in a certain action now pending

undetermined in the District Court of the United States for the Southern District of New York, between United States of America, Plaintiff and Lester Packer, Defendant, on the part of the defendant and that you bring with you and produce at the time and place aforesaid, a certain Report made by the Federal Bureau of Investigation to the Department of Justice, in the matter of the appeal and classification of Lester Packer, made pursuant to the Selective Service and Training Act of 1948, and used to determine the appeal of Lester Packer heard before Hon. Jackson A. Dykman, Hearing Officer, for a classification of 4-E, now in your custody, and all other deeds, evidences and writings which you have in your custody or power concerning the premises. And for failure to attend, you will be deemed guilty of a contempt of Court, and liable to pay all loss and damage sustained thereby to the party aggrieved, and forfeit Two Hundred and Fifty Dollars in addition thereto.

Witness the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the Borough of Manhattan, City of New York, the 12th day of December 1951.

WILLIAM V. CONNELL,
Clerk.

HERMAN ADLERSTEIN,
Attorney for Defendant.

11 In United States District Court

AFFIDAVITS IN OPPOSITION TO MOTION TO QUASH SUBPOENA

STATE OF NEW YORK,
County of New York:

Lester Packer, being duly sworn, deposes and says that he is the defendant herein.

That he has authorized his Attorney herein to subpoena the Report of the F. B. I., mentioned in the moving papers, on the ground that such Report is material and necessary to his defense in this prosecution against him, and that such authorization is annexed hereto as Exhibit "A".

That deponent expects in good faith to use said F. B. I. Report at the trial, to prove that he acted sincerely in making claim for a 4-E Classification under the 1948 Selective Service Act, that he intends to show by said Report that he had Religious Training which taught him to be opposed to war in all forms, that there is no basis for the classification given deponent, and that the conclusions of the Hearing Officer were contrary to law and the facts.

That by the F. B. I. Report deponent expects to show that the following conclusions of the Hearing Officer, made in his Report, are erroneous:

"Registrant received religious training in a faith which is not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form."

12 "The present case in the opinion of the Hearing Officer is one in which the registrant has failed to establish by sufficient evidence that his opposition to participation in war arises from religious training and belief."

That the use of said Report on the trial is therefore material to show that deponent complied with the 1948 Draft Law and Regulations issued thereunder, to be entitled to a 4-E Classification.

That Peyton Ford, Assistant Attorney-General, in an advisory opinion, showed that defendant was opposed to war, but that his opposition was based on philosophical grounds or a personal moral code; that this shows that Mr. Ford had two different ideas, and that he was not sure himself; that both of these conclusions are wrong, and that the F. B. I. Report will show that.

That defendant proved, without contradiction, that he received Religious Training, that he believes in God, that he is against killing and war, and that his Religious Training was both significant and affected his subconscious.

WHEREFORE IT IS RESPECTFULLY REQUESTED THAT the motion to quash the subpoena duces tecum herein be denied, that the case be adjourned until the motion is decided, and for such other and further relief, as to the Court may seem just and proper.

LESTER PACKER.

Verified December 17, 1951.

STATE OF NEW YORK,
County of New York, ss:

13 Herman Adlerstein, being duly sworn, deposes and says that he is the Attorney for the Defendant herein, and that the motion to quash the subpoena should be denied.

That the Report of the Federal Bureau of Investigation, which has been subpoenaed is material to the defense, as it has an important bearing in showing the sincerity of the defendant's convictions against war, and also will show that defendant received religious training which is the basis of his opposition to war.

That the Report of the F. B. I. was quoted from by the Hearing Officer in his Report, and that defendant believes that said Report

will show that the conclusions of the Hearing Officer were not based upon the facts and were erroneous in law.

That the law permits such documents, as the F. B. I. Report to be subpoenaed by a defendant in a criminal action, particularly, as in this case, when the Report was part of the basis of the administrative determination.

That the following points are made to uphold the validity of the subpoena duces tecum herein:

1. The decisions of this Circuit allow it in criminal cases, lest a defendant be convicted, when a document in possession of the Government might prove him innocent.

2. The Selective Service Regulations permit subpoena of Records used in defendants' classification, (Sec. 1670).

3. The Report of the F. B. I. should have been included in defendant's cover sheet under Selective Service Regulations and Due Process of Law, and the Government's affidavit on this motion was not correct, in saying that the file contains all the papers to which defendant is entitled.

4. That there are four types of document, as to production of which, question has been raised in Court proceedings. These are known as "secret, top-secret, confidential, and restricted." Subpoena of the last two types has been recognized as valid. In this case the United States Attorney has called the Report of the F. B. I. "confidential."

5. An Executive Order, which does not allow the use of a document in Court, because such document is confidential, is not valid, when such Order is in contravention of the law. The Rules of this Court allow the subpoena, the Selective Service Regulations allow it, and, the Due Process clause of the Constitution allows it.

WHEREFORE, deponent joins in the request that the motion to quash the subpoena herein be denied.

HERMAN ADLERSTEIN.

Verified January 2, 1952.

(Exhibit "A", used in opposition to the motion, is omitted from the Record on Appeal. It is an authorization to the Attorney for Defendant to subpoena the FBI Report.)

In United States District Court

ORDER ON MOTION FOR INSPECTION

Motion denied. See opinion of Judge Conger, filed January 31, 1952—U. S. v. John Romano, etc., C 135-135- 2/29/52.

HENRY W. GODDARD,

U. S. D. J.

In United States District Court

ORDER ON MOTION TO QUASH SUBPOENA

Motion granted. See opinion of Judge Conger of January 31, 1952,
U. S. v. John Romano, C 135-135, etc.

HENRY W. GODDARD,
U. S. D. J.

2/29/52.

15 United States District Court Southern District of New York

STENOGRAPHERS' MINUTES

Before:

Hon. JOHN F. X. McGOHEY, District Judge.

New York, March 26, 1952,
11:00 o'clock a. m.

APPEARANCES:

MYLES J. LANE, Esq., United States Attorney, for the Govern-
ment;

By LOUIS J. GROSSMAN, Esq., SILVIO J. MOLLÓ, Esq., and DANIEL
H. GREENBERG, Esq., Assistant United States Attorneys.

HERMAN ADLERSTEIN, Esq., Attorney for Defendant.

16 Mr. GROSSMAN: Before we start, on talking to the at-
torney for the defendant, he advised me that the defendant
has consented to a waiver of a jury trial. Accordingly, I have
prepared a stipulation which I would like your Honor to approve
as to the form, and also have your Honor advise the defendant
of his constitutional rights.

The COURT: Is he represented by counsel?

Mr. GROSSMAN: He is represented.

The COURT: Isn't that the purpose of his counsel, to advise him?

Mr. GROSSMAN: We also would like your Honor to approve the
stipulation.

The COURT: Have you shown it to your adversary?

Mr. ADLERSTEIN: I have agreed to stipulate to waive the jury.

The COURT: Have you seen the particular form?

Mr. ADLERSTEIN: This is consented to, as to form.

The COURT: Will you have it signed?

(Defendant signs stipulation.)

Mr. GROSSMAN: Will your Honor approve that now (handing to Court)?

The COURT: Mr. Adlerstein, have you discussed this with your client before coming up here?

Mr. ADLERSTEIN: I have, your Honor.

17 The COURT: Have you explained to him exactly what he is doing by waiving his right to trial by jury?

Mr. ADLERSTEIN: Well, I did explain to him what he was doing. I told him he had a right to a jury trial and I explained to him that he could try the case by the jury or by the Court without a jury, and I told him why I thought he should try it without the jury.

The COURT: You did so advise him?

Mr. ADLERSTEIN: Yes, your Honor.

The COURT: Very well.

Will you stand up?

(The defendant arose as requested.)

The COURT: You have heard what your attorney just said?

The DEFENDANT: Yes, sir.

The COURT: And you have retained this attorney, yourself?

The DEFENDANT: That is right, your Honor.

The COURT: He hasn't been assigned to you by the Court?

The DEFENDANT: That is right.

The COURT: You understand now that by signing this waiver, approved by the Court, you will now submit to the Court alone the question of any fact that has to be determined, as well as questions of law?

18 The DEFENDANT: That is right, your Honor.

The COURT: You understand that?

The DEFENDANT: Yes.

The COURT: And, acting on the advice of your counsel and understanding exactly what he has told you, you freely stipulate to waive your rights to trial by jury?

The DEFENDANT: That is right, your Honor.

The COURT: Very well. I will approve it.

Mr. GROSSMAN: At this time, your Honor, I would like to offer the stipulation waiving the jury, as Government's Exhibit 1, so it will be part of the record in this case.

The COURT: Very well. It is received.

(Marked Government's Exhibit 1.)

Mr. GROSSMAN: At this time, your Honor, I would like to make a statement for the record in connection with a conference I have had with Mr. Adlerstein, whereby he has consented to concede certain matters, which would serve to expedite this trial and to

prevent the Government from calling a group of witnesses; namely, the first concession is that the Lester Packer named in the indictment here is the same individual now sitting at counsel table, and that on or about the 5th day of November, said Lester Packer appeared at the induction station and refused to take the one step forward.

19 Q I believe that is conceded, Mr. Adlerstein?

Mr. ADLERSTEIN: That is conceded.

Mr. GROSSMAN: And that this event took place—

The COURT: Precisely what do you mean by that expression, "one step forward"? I know it is used in the decision, but tell me what you mean by it.

Mr. GROSSMAN: Yes. It means, briefly, that pursuant to the regulations there are various administrative steps allowed to Selective Service registrants, and in the cases of conscientious objectors, they are given the right to certain hearings and certain appeals.

The COURT: Tell me, what is the one step forward that it is now being conceded that this man did not take? That is what I want to know.

Mr. GROSSMAN: That is, he reports for induction pursuant to a notice to proceed, and that is his last administrative step.

The COURT: Do you mean to say that he did not report for induction?

Mr. GROSSMAN: He did not report for induction.

The COURT: What is it he refused to do?

Mr. GROSSMAN: At the induction station they call the names out and ask them to take the one step forward for the purpose of swearing into the armed forces of the United States. That is the last administrative step which he refused to take.

20 The COURT: Very well.

Mr. GROSSMAN: A further stipulation is to be made by the attorney for the defendant, namely, that the cover sheet and papers contained therein is the whole Selective Service file of the defendant, Lester Packer.

Mr. ADLERSTEIN: I will concede that that is the Selective Service file, and I will consent that it go into evidence.

Mr. GROSSMAN: And that it contains all papers that were submitted by this defendant in connection with all of his hearings and all of his processes prior to his being ordered for induction.

Mr. ADLERSTEIN: That is correct.

Mr. GROSSMAN: I would like this marked in evidence, your Honor, as Government's Exhibit 2.

The COURT: It may be received.

(Marked Government's Exhibit 2.)

Mr. GROSSMAN: I believe the defendant has also consented to stipulate that all of the papers contained in this file may be put in evidence individually for the Court's perusal so that—

The COURT: Isn't the whole file now in evidence?

Mr. GROSSMAN: Yes, your Honor, but we would like to show the various steps that were taken.

21 The COURT: Yes, you may do that. But that is merely a matter of procedure. Everything in that file, I understand, was consented to and received in evidence without objection.

Mr. ADLERSTEIN: It isn't the practice—

The COURT: It is not a question of the practice; it is a practice of what you have just conceded.

Mr. ADLERSTEIN: That is right.

The COURT: You do concede that everything in that file relates to your client, sitting here now beside you in the courtroom.

Mr. ADLERSTEIN: That is right.

The COURT: And you now raise no objection to the admission in evidence of everything in the file?

Mr. ADLERSTEIN: That is right.

The COURT: Very well.

Mr. GROSSMAN: Merely, your Honor, with reference to the procedure of bringing each one of these papers to your attention—

The COURT: Well, once a paper is in evidence, counsel, you can read any part of it, and it is all before me. All you have to do is direct my attention to it. It need not be marked separately unless, for some reason, you desire it to be, and then it will be marked Exhibit 1-A, B, C, or whatever it is—or Exhibit 2; it is Exhibit 2, isn't it?

22 OFFERS IN EVIDENCE

Mr. GROSSMAN: That is right, your Honor.

The first paper that I should like to call your attention to, and the one I will constantly be referring to, is the Selective Service questionnaire, SS Form 110, of this registrant, which is really one of the first papers filled out and signed by him.

Mr. ADLERSTEIN: That isn't 110. I think it is 100, isn't it?

Mr. GROSSMAN: 100. I am sorry. 100. I am corrected. SS Form 100.

This questionnaire was mailed to the registrant on 7/19/49, and received back from him on August 29, '49.

In connection therewith, I would especially like to call your Honor's attention to Series 14, which is a series whereby an individual who is conscientiously opposed to war may sign his name and state so.

However, in this questionnaire, the registrant, Lester Packer,

didn't sign Series 14, and made no claim at that time that he was conscientiously opposed to war.

I would like this paper marked as Government's Exhibit 2-A, if your Honor please?

(Marked Government's Exhibit 2-A.)

The COURT: This is Series what?

Mr. GROSSMAN: Series 14, your Honor, on next to the 23 last page.

The next paper, which I would like marked as Government's Exhibit 2-B, is a simple statement sent to the registrant, containing certain questions which he did not answer in his original questionnaire, and the board, in order to have a complete questionnaire, sent him the additional form on August 29, 1949, and received it back on September 2, 1949.

(Marked Government's Exhibit 2-B.)

Mr. GROSSMAN: The next document, which I offer in evidence as Government's Exhibit 2-C, is SS Form No. 223, which is an order to report to the armed forces for physical examination. The date of mailing was September 27, 1950. This defendant, Lester Packer, was ordered to report at eleven a. m. on October 4, 1950.

(Marked Government's Exhibit 2-C.)

Mr. GROSSMAN: At this time, if I may, your Honor, I would like to call your attention to the fact that on the back of the questionnaire, on the last page of the questionnaire—

The COURT: Which questionnaire?

Mr. GROSSMAN: Government's Exhibit 2-A. There is listed the minutes of all actions taken by the local board and appeal board in connection with this registrant's classification, and on October 20, 1949, there is a notation that a Form 110 was sent to the 24 registrant.

Now, that Form 110—there is also a notation prior to that that he was classified 1A by the local board on September 28, '49; and sent Form 110. 110 is merely a postcard, of which a duplicate is not kept in the file, advising him of his classification and advising him of his rights in connection therewith, of his rights to a hearing within ten days, or to an appeal within ten days. Such notice was sent to him pursuant to the endorsement on the back of the questionnaire.

The COURT: Is that disputed?

Mr. ADLERSTEIN: Not disputed, your Honor.

The COURT: Very well.

Mr. GROSSMAN: Now come to Government's Exhibit 2-D, which is a certificate of acceptability, which was sent to the registrant

on October 4, 1950, which indicates that he was found acceptable for induction into the armed services.

(Marked Government's Exhibit 2-D.)

Mr. GROSSMAN: Next, your Honor, I offer Government's Exhibit 2-E, which is a letter dated October 20, 1950—

The COURT: This is 2-E?

Mr. GROSSMAN: 2-E, letter dated October 20, 1950, signed by the registrant, or defendant in this case, in which he requests, for the first time, that he be sent a Special Form 150 for conscientious objectors.

I might at this time also mention to your Honor that had the registrant indicated in his original questionnaire that he was a conscientious objector, by signing Series 14, he would automatically have been sent a new questionnaire, which is known as SS Form 150, or a special form for conscientious objectors. Not having done so in his original questionnaire, he makes the request in this letter, which reads as follows:

"Dear Sir: After long and careful deliberation I have reached the conclusion that I am opposed to war in all forms, and therefore request that I be put in the classification 4E and that I be sent Special Form 150 for conscientious objectors. Very truly yours, Lester Packer."

And he gives his Selective Service number.

This letter was received at the local board on October 23, 1950.

The COURT: What is the date of it?

Mr. GROSSMAN: October 20th, the letter is dated; a registered letter.

(Marked Government's Exhibit 2-E.)

Mr. GROSSMAN: The last page of his questionnaire now indicates, your Honor, that on October 23rd, pursuant to his request, the Form 150 was sent to him, and I offer now as Government's Exhibit 2-F, the completed Form 150 which was filled out, signed by the registrant, with additional statements contained therein, and returned to the local board on October 31, 1950. This is known as Special Form for Conscientious Objectors, SS Form 150.

(Marked Government's Exhibit 2-F.)

Mr. GROSSMAN: My next offer is Government's Exhibit 2-G, a copy of a letter dated November 2, 1950, addressed to the registrant from the clerk of the local board, which reads as follows:

"Mr. LESTER PACKER, 1478 Walton Avenue, Bronx, New York. Dear Sir: After reviewing your case on November 1, 1950, the

Board has decided that the fact submitted does not warrant a re-opening of your classification. Yours truly, Helen Middlevitch, Clerk."

(Marked Government's Exhibit 2-G.)

Mr. GROSSMAN: Now offer as Government's Exhibit 2-H, a letter dated November 7, 1950, signed by the registrant and addressed to him—

The COURT: What is that date?

Mr. GROSSMAN: November 7, 1950, signed by the registrant and addressed to his local board, which reads as follows:

27 "Dear Sirs: I am in receipt of your letter of November 2nd.

It has been brought to my attention that I am no longer eligible to appeal for a hearing. Although I recognize that I do not have the legal right to a hearing due to the lapse in time since registration, I do, however, feel I should be allowed the opportunity of a hearing inasmuch as I have been unaware of my right to appeal after this period of time. I feel that if I am allowed the opportunity to present my case personally before the hearing officer, it will enable you to have a clearer and more comprehensive picture of the entire case. I shall also welcome a thorough investigation by the FBI so that all the details may be entered into the record. I hope the board will allow me favorable consideration in view of the fact that I have been unaware of the procedure in making an appeal.

"Very sincerely, Lester Packer"—and his Selective Service number.

This letter was received by the board on November 9, 1950.

(Marked Government's Exhibit 2-H.)

Mr. GROSSMAN: My next offer is Government's Exhibit 2-I, a copy of a letter dated November 16, 1950, signed by the clerk of the local board, and addressed to the registrant, which reads as follows—

28 The COURT: What is the date, again?

Mr. GROSSMAN: November 16, 1950.

"Mr. Lester Packer, 1478 Walton Avenue, Bronx, New York. Dear Sir: The Board reviewed your case on November 16, 1950, and it was their decision that your request for an interview is denied. Yours truly, Helen Middlevitch, Clerk."

(Marked Government's Exhibit 2-I.)

Mr. GROSSMAN: My next offer is Government's Exhibit 2-J, Form of Order to report for induction. It is SS Form No. 252, and it is dated November 17, 1950, and it is addressed to the registrant,

Lester Packer, and he is ordered to Report for induction on the 6th day of December, 1950.

I note also that this copy of the Order to Report for induction has, marked across it, "cancelled", that it was subsequently cancelled. Just to keep the entire story, I am introducing it:

-(Marked Government's Exhibit 2-J.)

Mr. GROSSMAN: I would now like to call your Honor's attention to the fact that the rear page of this questionnaire contains a notation dated 11/22/50—November 22, 1950—that the file was sent to Major Akst—he is the legal consultant of Colonel Cobb, Director of Selective Service System of New York Headquarters, per telephone of 11/22/50.

I now offer as Government's Exhibit 2-K, a letter signed by Candler Cobb, New York City Director of Selective Service System. This letter is dated November 24, 1950; was received by the local board on November 27, 1950.

The letter reads as follows:

"Selective Service System. Local Board No. 22. 1910 Arthur Avenue, Bronx, New York. Re Lester Packer, 50-22-29-28L. Gentlemen: The cover sheet of the above-named registrant is herewith returned. Examination of the facts contained therein discloses no irregularity on the part of the Local Board in its classification of the registrant. It has always been the practice of this headquarters to permit all registrants who claim to be conscientious objectors, to have their cases appealed to the Appeal Board and possibly thereafter be forwarded to the United States Attorney for consideration by the hearing officer. This is done so that all registrants who claim to be conscientious objectors may be processed in the same way and be afforded all their rights, which may have elapsed or not, before any final determination is made in their case.

39 "Even though the registrant failed to sign Series 14 of the questionnaire referring to conscientious objectors, the file does disclose that the Board, during October, did supply the registrant with special form for conscientious objectors, SS Form 150, which he completed and returned to the Local Board on October 31, 1950. This may be considered indicative on the part of the Local Board to reopen and reconsider the registrant's claim anew. If this could be considered a reopening, then, pursuant to the regulations, the registrant should have been mailed a new notice of classification, SS Form No. 110, and thereafter his rights to appeal could have been extended an additional ten days.

"Rather than sending out a new SS Form No. 116 at this time it is suggested that his notice of induction be cancelled and that his case be sent to the Appeal Board, on the questions of objection to combatant and non-combatant duty as a conscientious objector.

Since the records indicate that he is to report for induction on December 6th, it is requested that you advise this office before that date as to what action is taken by your Board.

"Sincerely yours, (signed) Candler Cobb, New York City Director."

(Marked Government's Exhibit 2-K.)

Mr. GROSSMAN: I note, your Honor, where it says, "Form 116," in the last paragraph, it is a typographical error; it should be 110.

I now offer as Government's Exhibit 2-L a copy of a letter dated December 5, 1950, which was sent to the registrant, signed by the clerk of the local board. It reads as follows:

"Mr. Lester Packer: 1478 Walton Avenue, Bronx, New York. Dear Sir: This is to advise you that your induction, scheduled for December 6, 1950, has been cancelled until further notice. Yours truly, Helen Middleditch, Clerk."

(Marked Government's Exhibit 2-L.)

Mr. GROSSMAN: I now call your Honor's attention to the minutes on the back of the registrant's questionnaire, to a few notations, the first one dated 12/6/50, which indicates that the board and the AA, which indicates the appeal agent, reviewed the case.

There is another notation, dated 12/7/50, which says:

"Sent to board of appeals;" indicating that the registrant's file or his cover sheet was sent to the board of appeals.

The next notation, dated January 12, 1951, reads as follows:

"Appeal board panel No. 4 has reviewed the record, and determined that the registrant is not entitled to classification in Class 4E and is not eligible for classification in a class lower than 4E and has directed that file be transmitted to the Department of Justice for an advisory recommendation pursuant to section 1626.25-A-4, Selective Service regulations."

Your Honor, I now offer as Government's Exhibit 2-M, two copies which are contained in the file, of the same letter, a letter of the Chairman of the Appeal Board to Hon. Irving H. Saypol, U. S. Attorney, which letter is dated January 16, 1951, and reads as follows:

The COURT: Without reading it, what does it do, ask for an opinion?

Mr. GROSSMAN: It merely sends it on the usual course to have it referred for a hearing.

(Marked Government's Exhibit 2-M.)

Mr. GROSSMAN: I might state, your Honor, that when the case is received at the U. S. Attorney's Office, it is, of course, referred out to a hearing officer, and in this particular case the hearing officer was one Jackson Dykman.

The next offer is Government's Exhibit 2-N, letter dated April 9, 1951, addressed to Mr. Dykman, and signed by the registrant, which reads as follows:

"Dear Mr. Dykman: I am in receipt of a notice for a hearing to be held on May 7th at 9:30 a. m. I would appreciate your notifying me as to the nature and character of any evidence which is
33 unfavorable and tends to defeat my claim for exemption.

"Thanking you for your kind efforts, I remain, yours truly,
Lester Packer."

(Marked Government's Exhibit 2-N.)

Mr. GROSSMAN: I now offer as Government's Exhibit 2-O a statement dated May 4, 1951, and signed by two individuals, Arthur W. Miller and Philip S. Liebman. The statement reads as follows:

"To whom it may concern: This is to verify the fact that Lester Packer was known to be conscientiously opposed to war before registration for Selective Service and we believe his convictions to be of sincere nature. (Signed) Arthur W. Miller, Philip S. Liebman."

That was handed in before he had his hearing before Hon. Jackson Dykman.

(Marked Government's Exhibit 2-O.)

Mr. ADLERSTEIN: Could I interrupt, your Honor?

The COURT: Just a minute, please.

Yes?

Mr. ADLERSTEIN: In regard to Government's Exhibit 2-N, I would like to have the Government offer in evidence the reply which Jackson Dykman made to that letter.

Mr. GROSSMAN: I gladly would, except it is not part of the file. The file never contained a copy.

34 Mr. ADLERSTEIN: Could I offer it, then, at this time?

Mr. GROSSMAN: I have no objection.

The COURT: It doesn't seem to make much difference who offers it. If it will complete the story, it ought to be received, and I will receive it.

Mr. GROSSMAN: I have no objection to it, your Honor. I think we ought to mark it Government's Exhibit 3 at this time.

Mr. ADLERSTEIN: No, Defendant's Exhibit A.

(Marked Defendant's Exhibit A.)

Mr. GROSSMAN: I now offer as Government's Exhibit 2-P the report of the hearing conducted by the Department of Justice, pursuant to Section 6-J of the Selective Service Act of 1948, in regard to this defendant, Lester Packer. The report is dated July 14, 1951, and is signed by Jackson A. Dykman, the hearing officer.

(Marked Government's Exhibit 2-P.)

Mr. GROSSMAN: Your Honor, if I may revert back to Defendant's Exhibit A, for the point of clarifying something to your Honor, I would like to state that when a hearing officer gets—

The COURT: Is there anything that you think is not clear? I haven't any doubt about it.

Mr. GROSSMAN: I would like to elaborate on it a bit.

35 The COURT: All right.

Mr. GROSSMAN: At the time the hearing officer receives the case and sends the registrant a notice of the hearing, contained in that notice is a statement that pursuant to regulations, the registrant may inquire, if he desires, what, if any, evidence is unfavorable to him and pursuant to that he made the request, and this is written in answer to it.

I would like to just call to your attention that that was all done pursuant to the regulation.

The COURT: I understand.

Mr. GROSSMAN: I would like to now offer as Government's Exhibit 2-Q a letter from the Department of Justice, dated July 24, 1951, and addressed to the Chairman of Appeal Board Panel No. 4, signed by Peyton Ford, Deputy Attorney General, in which he recommends that the registrant be not classified as a conscientious objector.

(Marked Government's Exhibit 2-Q.)

Mr. GROSSMAN: I would like to now offer as Government's Exhibit 2-R the minutes of the action taken by the appeal board in this case, showing that the appeal board, on August 20, 1951, again classified this registrant 1A by a vote of 4 to 0.

(Marked Government's Exhibit 2-R.)

36 Mr. GROSSMAN: In connection with that, I think we should also mark as the same exhibit the forwarding letter from the appeal board, transferring the file back and indicating their result to the local board.

The COURT: Transferring it back to the local board?

Mr. GROSSMAN: To the local board.

I would like to now offer as Government's Exhibit 2-S a form, SS-Form No. 262, which is an order to report for induction. The

form is dated August 30, 1951, and orders the registrant to report on September 14, 1951.

(Marked Government's Exhibit 2-S.)

Mr. GROSSMAN: I would like to also state to your Honor that on the minutes of the registrant's questionnaire is indicated that on August 24, 1951, a new form, SS Form 110, the postcard which I have heretofore referred to, was sent to the registrant, indicating that he is still in 1A by a vote of the appeal board, 4 to 0.

Next is Government's Exhibit 2-T, a letter dated August 30, 1951, and addressed to General Lewis B. Hershey, Division of Selective Service, Washington, D. C., and signed by the registrant in this case.

In that letter, your Honor, briefly, he goes into why he feels he should have been classified as a conscientious objector at his hearing, which was not done.

37 (Marked Government's Exhibit 2-T.)

Mr. GROSSMAN: Next is Government's Exhibit 2-U, letter dated September 6, 1951, addressed to the registrant by the clerk of the local board, reading as follows:

"Mr. LESTER PACKER, 1478 Walton Avenue, Bronx, New York. Dear Sir: This is to advise you that the Board reviewed your letter of August 30, 1951, and it is their decision that your classification remain unchanged and that you are to report for induction on September 14, 1951, as scheduled."

(Marked Government's Exhibit 2-U.)

Mr. GROSSMAN: Next is Government's Exhibit 2-V, which is a copy of a letter sent to the registrant by Candler Cobb, the New York City Director of Selective Service, and it is dated September 6, 1951, reading as follows:

"Mr. LESTER PACKER, 1478 Walton Avenue, Bronx, New York. Dear Mr. Packer: This will acknowledge receipt of your special delivery registered letter dated August 31, 1951, which I received this morning. You must bear in mind that your case has been before me since last November, which means that I am entirely familiar with the progress of your classification. However, I have again today reviewed the proceedings held on your behalf. I do not feel that that there is any reason for me to intervene in your case. You have had all your procedural rights according to law and regulations, and your classification of 1A was unanimously confirmed by the Appeal Board. Your order for induction will, therefore, stand for September 14, 1951. Sincerely yours, Candler Cobb, New York City Director."

38

(Marked Government's Exhibit 2-V.)

Mr. GROSSMAN: I next call your Honors attention to the notation on the minutes of the Selective Service questionnaire of the registrant, dated 9/10/51, which reads as follows:

"Per telephone conversation with Mr. Wagner"—he is a gentleman at Selective Service Headquarters—"Registrant advised not to report for induction 9/14/51."

Next in the file we find Government's Exhibit 2-W, which is a letter dated September 6, 1951; and addressed to the Director of Selective Service, New York City, signed by Lewis F. Kosch, Chief of the Manpower Division of the Selective Service Division, National Headquarters, in Washington.

It reads as follows: "Dear Col. Cobb. It is requested that the cover sheet of the above-named registrant be forwarded to this headquarters for review."

The Court: Let me see that.

(Mr. Grossman hands document to the Court.)

(Marked Government's Exhibit 2-W.)

39 Mr. GROSSMAN: I would like to now offer two papers as Government's Exhibit 2-X.

One is a letter to the registrant, telling him not to report on September 14th, and that he will be advised in the near future as to what date to report, and the other one is a form, SS Form No. 264, which is a postponement of induction form; namely, from September 14th—he is notified that his induction is postponed until October 16, 1951.

(Marked Government's Exhibit 2-X.)

Mr. GROSSMAN: I would now like to offer a group of letters as Government's Exhibit 2-Y—a group of three letters. One is a letter for the registrant from Washington National Headquarters, signed by Lewis Kosch, advising him that his Selective Service file has been reviewed and that there is no need for further action in his case in order to prevent any injustice.

The next letter is to Colonel Cobb; returning the cover sheet, stating that "after examining the cover sheet, we are of the opinion that there is no need for further action in this case in order to prevent injustice."

And the third letter is from Colonel Cobb, from Selective Service Headquarters, New York, to the chairman of the appeal board, returning the cover sheet to him with copies of the other letters.

(Marked Government's Exhibit 2-Y.)

40 Mr. GROSSMAN: As Government's Exhibit 2-Z, I now offer a letter dated October 9, 1951, addressed to the registrant, from the clerk of the local board, which reads as follows:

"Dear Sir: This is to remind you that you are to report for induction"—

The COURT: What is the date?

Mr. GROSSMAN: October 9, 1951.

"Dear Sir: This is to remind you that you are to report for induction on October 16, 1951, at nine a. m., to 39 Whitehall Street, New York City.

(Marked Government's Exhibit 2-Z.)

Mr. GROSSMAN: I now offer as Government's Exhibit 2-AA, a form dated October 25, 1951, showing that the registrant appeared on October 16, 1951, and was not inducted because he was held as a holdover for November 5, 1951.

It states that: "The above inducted had been made an exception from holdover. It is requested that you direct him to report at 20 Pearl Street, New York, New York, for immediate induction on 5 November 1951, at eight a. m."

(Marked Government's Exhibit 2-AA.)

Mr. GROSSMAN: I might mention, your Honor, that that is because they desire to check him further physically, that that procedure is usually followed.

41 I now offer as Government's Exhibit 2-BB, a letter dated October 26, 1951, addressed to the registrant and signed by the clerk of the local board, which reads as follows:

"Dear Sir: This is to advise you that you are to report to 44 Whitehall Street, entrance 20 Pearl Street, New York City, on November 5, 1951, at eight a. m. for immediate induction."

(Marked Government's Exhibit 2-BB)

Mr. GROSSMAN: With the consent of the defendant, your Honor, I now offer as Government's Exhibit No. 3, a statement dated November 5, 1951, which is the same date the registrant was ordered to report for induction. The statement is signed by William F. Donegan, Jr., Captain, Infantry, Induction Officer at 39 Whitehall Street, New York.

Attached to Captain Donegan's statement is statement he received from the registrant, or defendant in this case, which is also dated 5 November 1951, which reads:

"I refuse to be inducted in the armed forces of the United States," and signed by the defendant, Lester Packer.

(Marked Government's Exhibit 3.)

Mr. GROSSMAN: I might mention, your Honor, that the last notation contained on the back of the Selective Service questionnaire, for the sake of completion, is dated 11/6/51. It reads as follows:

"As per telephone conversation with Mr. Mollo, 11/5, file hand-delivered this date to Foley Square," which indicates that the file was delivered to the U. S. Attorney's Office on that date.

At this point, the Government rests, your Honor.

The COURT: You desire, I am sure, to put in a defense?

Mr. ADLERSTEIN: I do, your Honor.

The COURT: At this time we will take a short recess so you can look over your papers.

Mr. ADLERSTEIN: Would your Honor wait before we recess, so that I can make a motion?

The COURT: No, I prefer you wait until we come back.

We will take a 10-minute recess.

(Short recess.)

MOTION TO DISMISS INDICTMENT AND DENIAL THEREOF

Mr. ADLERSTEIN: If it please the Court, I would like to make a motion at this time.

I move to dismiss the indictment, with acquittal of the defendant, on the following grounds:

The last page of the hearing officer's report, Government's Exhibit 2-P, I believe it is, bears a statement which is contrary to law, made by Jackson A. Dykman, the hearing officer. He made this conclusion:

"Registrant received religious training in a faith which is not opposed to military service, and it is quite speculative to assume that such training forms a basis of unwillingness to participate in a war of any form."

It is our contention that that is an erroneous statement of law and having been used to influence the decision of the appeal board is contrary to Section 6 (j) of the Selective Service Act of 1948, and therefore contained an erroneous statement to the appeal board.

The COURT: In what respect, please?

Mr. ADLERSTEIN: In respect to the fact that it stated that a person trained in the Hebrew faith cannot make a claim as a conscientious objector, or at least that was the effect of this conclusion, and that is contrary to the law as stated in 6 (j) of the Draft Law of 1948.

And also on the further ground that Defendant's Exhibit A shows that the hearing officer said "there was nothing unfavorable to your

claim except that you stated you are not a member of a religious sect or organization."

And that is also contrary to provisions of Section 6(j) of the Draft Law of 1948, known as the Selective Service and Training Act of 1948.

THE COURT: Let me see the section. Do you have it there?

44 (Mr. Adlerstein hands document to the Court.)

THE COURT: Have you any other ground that you wish to urge in support of the motion?

MR. ADLERSTEIN: Not at this time. I reserve other grounds until after my proof is in.

THE COURT: Have you any other grounds than this to move now, at the end of the Government's case? That is what I mean.

MR. ADLERSTEIN: No, sir.

THE COURT: Very well.

Motion denied.

MR. ADLERSTEIN: Exception.

Your Honor, I prepared a fairly lengthy trial memorandum, and I would appreciate it if your Honor would accept it.

THE COURT: Yes.

ISADORE B. HOFFMAN, called as a witness on behalf of the defendant, being first duly sworn testified as follows:

DIRECT EXAMINATION.

By Mr. ADLERSTEIN:

Q. You are a duly ordained rabbi?

A. I am.

Q. Will you tell us what your training has been to become ordained as a rabbi?

45 A. Yes. In addition to preliminary and elementary Jewish studies, I went through the regular course of instruction and preparation for the rabbinate in the Jewish Theological Seminary of America, which is situated here in New York.

I was ordained by the seminary in 1924.

Q. Will you tell us what you are doing at the present time?

A. For the past eighteen years I have been a member of the religious staff of Columbia University, the University having arranged to have a Roman Catholic priest, a Protestant minister, and a rabbi, on the staff to act as counselors to the students. I am the rabbi on the staff.

44 I have also been rabbi of a congregation in Utica, New York, for a number of years, and director of the Hillel Foundation for Jewish students at Cornell University for five years.

I might add that I have been a member of the Rabbinical Assembly of America for the past twenty-five years.

Q. Will you tell us what that Rabbinical Assembly is?

A. The Rabbinical Assembly is the organization of about 500 rabbis who have been trained to teach and preach conservative or traditional Judaism. It has its headquarters at the Jewish Theological Seminary, and is one of the two largest rabbinical organizations in the world.

46 Q. Do you hold a position in the Rabbinical Assembly?

MR. GROSSMAN: Your Honor, I don't mean to interrupt, but may I inquire at this time the purpose of this testimony; whether it is as a character witness—

THE COURT: Well, I think it is obviously more than that. But I will accept it until such point as we get into a little more detail.

Right, now the witness is merely being qualified. I assume, as an expert, in Judaism; is that, right?

MR. ADLERSTEIN: That is right.

THE COURT: Very well. And on the question that you raised on your motion?

MR. ADLERSTEIN: That is exactly right.

THE COURT: As to what you consider to be Mr. Dykman's interpretation as to how Judaism feels as to war.

I will overrule the objection at this time and let counsel go ahead.

A. (Continuing) I have been a member of the Executive Council of this Rabbinical Assembly for several years and served on a number of their other committees. Ever since its organization, eleven years ago, I have been chairman of the Standing Committee of the organization on Conscientious Objectors. I have been re-appointed each year.

I have also been the treasurer of the Joint Rabbinical Committee on Conscientious Objectors, set up by the Rabbinical
47 Assembly and the Central Conference of American Rabbis, the other large organization of rabbis in this country—Reform rabbis—and served in that capacity for six or seven years.

Q. By reason of these positions you hold in the Rabbinical Assembly; and have held, have you made it your position to study the Jewish religion regarding its standing on conscientious objection to war?

A. I have, sir.

MR. GROSSMAN: Objection, your Honor. That is immaterial, as to what the stand of any particular religion is.

THE COURT: Overruled.

Mr. GROSSMAN: May I respectfully call your Honor's attention to the Cox case.

The COURT: Yes, you may. I am familiar with it.

A. (Continuing) I have made a special study, though I would be familiar with the position of Judaism on the matter of participation in war and military training without the special study.

Q: You mean by reason of training as a rabbi?

A: Yes.

Q: Will you tell us, what is the position of the Jewish religion regarding conscientious objection to war?

Mr. GROSSMAN: Objection, your Honor.

The COURT: Sustained.

48 Q. Rabbi, is there a position in the Jewish religion regarding conscientious objection to war by adherents of the Jewish faith?

A: Yes, sir.

Mr. GROSSMAN: Objection, your Honor.

The COURT: Sustained.

Strike the answer.

Mr. ADLERSTEIN: Exception.

Is it your Honor's ruling that we are not permitting to go into that?

The COURT: My ruling, in accordance with the decisions, that it is not relevant.

Mr. ADLERSTEIN: Even where there is an error of law?

The COURT: It is not relevant.

Mr. ADLERSTEIN: Very well.

The COURT: You have your exception. That is the reason I allowed you to qualify the witness and get it in, so that you have your right on appeal, if I am wrong.

Mr. ADLERSTEIN: Thank you, your Honor.

Very well.

(Witness excused.)

49 LESTER PACKER, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. ADLERSTEIN:

Q. Referring to Exhibit 2-E, in which you wrote a letter to your draft board stating that you have come to the conclusion that you

are a conscientious objector to war, were you asked at the hearing by Mr. Dyckman, regarding why you wrote that letter?

A. Yes, I was. As a matter of fact, I was asked a number of questions by Mr. Dyckman.

Q. But you were asked that particular question; is that right?

A. Well, he didn't phrase it that way. He asked me why I had filed at a late period.

Q. And what did you say?

A. I told him that prior to that I was under the erroneous impression that you had to be a member of a religious sect in order to be an objector, and prior to that time that I objected, I felt I would have to commit a violation in order to state my position; on later evaluation I had decided that, being religious, I felt I did come within the law in spite of the fact that at the time of my objection I was not a member of any religious sect.

Q. You stated this at the hearing to Colonel Dyckman; is that correct?

A. That is correct. There was also another point I brought out.

Q. Just a moment. We are going to refer to the hearing now which you had before Col. Dyckman. Will you state what he asked you and what your answers there were?

Mr. GROSSMAN: Objection, your Honor.

The COURT: Sustained.

Q. Did Mr. Dyckman state to you that you were not a member of a religious sect or organization, at the hearing?

Mr. GROSSMAN: Objection, your Honor.

The COURT: Sustained.

Mr. ADLERSTEIN: Your Honor, my purpose in asking these questions is to show that there is no basis in fact for the classification, and the only way I can do that is to bring out what took place at the hearing.

Mr. GROSSMAN: If your Honor please—

The COURT: I don't want to hear argument on it. I have ruled.

Mr. ADLERSTEIN: I have no other proof if your Honor is not going to allow it. It has been done in other cases, and it is the only way I can prove my case, by showing what happened before the hearing officer.

Mr. GROSSMAN: That is not so, your Honor—

The COURT: Why argue about something when a ruling has been made?

The WITNESS: Your Honor, may I have a few moments to consult my attorney?

The COURT: Yes.

(The witness left the stand to consult with his attorney.)

The COURT: Do you want to take a recess, counselor?

Mr. ADLERSTEIN: No—

The COURT: If you want to go inside, you may go in here.

The WITNESS: Yes, I would like to.

Mr. ADLERSTEIN: Yes.

The COURT: All right.

(Short recess.)

By Mr. ADLERSTEIN:

Q. Did Mr. Dyckman, in his report of the hearing, referring to Government's Exhibit 2-P, state everything that took place at the hearing?

A. No, he did not.

Mr. GROSSMAN: Objection.

The COURT: I will allow that.

The WITNESS: He did not.

Q. Will you state what was omitted from the report that took place at the hearing.

A. Well, at one point I had asked him if there was anything detrimental to my position, which was on the F B I report. He said there was nothing which might prove unfavorable except the fact that I was not a member of any religious sect at this particular time.

Now, during the course of the hearing we had gone through a lengthy discussion as to my particular religious beliefs, and when he made the statement that the only unfavorable information they had was that I was not a member of any sect, I stated that I considered myself to be religious and he affirmed that statement.

Q. Is there anything else omitted?

A. Yes. There was another point omitted. I had mentioned some of my views—

The COURT: Views about what?

The WITNESS: I will explain that, your Honor.

A. (Continuing) Which had also been omitted, about my present philosophy in meeting any opposition.

What I mean by "opposition"—I mean evil. I told him that I could not at any time support war violently. I believed in using Gandhian methods in resisting an opponent. By "Gandhian methods," I meant this—

The COURT: Did you tell Mr. Dyckman what you meant? Are you telling us now what you told Mr. Dyckman or are you telling us something now that you did not tell Mr. Dyckman?

The WITNESS: I told Mr. Dyckman—

The COURT: Just a minute. You may tell us now anything that you said to Mr. Dyckman, but you may not tell us anything
53 which you are now stating for the first time.

The WITNESS: I see.

The COURT: Did you say something to Mr. Dyckman about Gandhiism?

The WITNESS: I did not alleviate on it. I did mention that I did believe in Gandhian methods.

The COURT: All right.

A. (Continuing) He asked me if I had read any books which might have influenced me. I told him I had not read any books which might influence me, except books in my religious training, but I had read books on the subject of this war, both pro and con.

Another statement which I had made to Mr. Dyckman, which did not appear on the report, was that at that time I was willing to participate in welfare or humanitarian projects which would benefit perhaps the world and the people of this country, but I could not in any way support war directly or indirectly.

Q. Was there anything else that was not in that report?

A. I cannot recall at this time.

Mr. ADLERSTEIN: That is all, excepting for the exception I have taken to your Honor's ruling regarding the exclusion of the hearing.

CROSS EXAMINATION.

By Mr. GROSSMAN:

Q. Did Mr. Dyckman give you an opportunity to state
54 whatever you wanted to tell him?

A. Well, I wouldn't say he was too inquisitive.

The COURT: That is not what you are asked.

The WITNESS: The point is—

The COURT: Just a minute, please, young man. You were asked this question: Did Mr. Dyckman give you the opportunity to state anything that you wanted to state?

Now, the answer to that question is either yes or no.

The WITNESS: Your Honor, there was a general attitude at the hearing—

The COURT: I am not asking about a general attitude; I am asking about a fact, and I would like responsive answers.

The WITNESS: He allowed me to present whatever I wanted to.

Q. In fact, at the end of the hearing he asked you this question: "Is there anything more you would like to say?"

Is that a fact, Mr. Packer?

A. I think he did, yes.

Mr. GROSSMAN: No further questions.

The COURT: Very well.

Do you have some further questions?

55 Mr. ADLERSTEIN: I would like to know whether the Government was quoting from the minutes of the hearing before Mr. Dyckman.

The COURT: What difference does it make?

Mr. ADLERSTEIN: I would like to offer the minutes in evidence, if he was.

Mr. GREENBERG: We would be very glad to do it, your Honor.

Mr. GROSSMAN: We have no objection.

The COURT: Very well. Offer them.

Mr. ADLERSTEIN: May I look at it?

The COURT: Do you mean you want to withdraw your offer?

Mr. ADLERSTEIN: I may have spoken too hastily.

The COURT: I am just trying to find out your position. You offered a document; it was not objected to, in fact it was consented to. If you want to withdraw your offer, you may withdraw it and it will have no effect on the trial.

I will deem it that you have not yet made the offer. You may look at it and if you wish to offer it, you may, and if you do not, you do not have to offer it.

Do you now offer them?

Mr. ADLERSTEIN: I offer the minutes in evidence.

The COURT: And there is no objection?

Mr. GROSSMAN: No objection.

56 The COURT: Very well.

(Marked Defendant's Exhibit B.)

Mr. ADLERSTEIN: Defendant rests.

Mr. GROSSMAN: Government rests.

MOTION FOR ACQUITTAL AND DENIAL THEREOF

Mr. ADLERSTEIN: I would like to move at this time to acquit the defendant on the following grounds:

First, that there was no basis in fact for the classification made; that the defendant should have been classified in 4E.

Second, the conclusion of Jackson Dykman regarding the religious training in a faith which is not opposed to military service is an error of law contrary to the provisions of Section 6(j) of the Selective Training and Service Act of 1948.

Third, the conclusion of Jackson Dykman that it was speculative to assume that the training in Hebrew faith formed the basis of opposition to participate in war was not a correct statement of the religious faith and gave erroneous advice to the appeal board.

Fourth, the conclusion of Jackson Dykman was without basis in fact and capricious and arbitrary.

Fifth, the conclusion of Deputy Attorney General Peyton Ford was without basis in fact, capricious and arbitrary, and contrary to the provisions of 6(j) of the Military Training and Selective Service Act of 1948.

57 Further, that said report of Peyton Ford misinterpreted Section 6(j) of the said Military Training and Selective Service Act of 1948.

The COURT: In what respect?

Mr. ADLERSTEIN: With respect to the fact that defendant, or registrant, had opposition to war, but it was philosophic or a moral code, whereas the evidence introduced showed that he believed in a Supreme Being and was opposed to war and therefore it was in error to come to the conclusion that he did come to. There was nothing in the record to justify the statement that the defendant's belief was philosophic or based on a moral code.

The COURT: Motion denied.

Mr. ADLERSTEIN: Exception.

The COURT: I find the defendant guilty.
Are you ready for sentence?

COLLOQUY RE PROBATION REPORT AND BAIL

Mr. ADLERSTEIN: I would like to have a probation report, if your Honor please.

The COURT: Very well.

Mr. ADLERSTEIN: And I also request that bail be continued until the probation report comes in.

Mr. GROSSMAN: If your Honor pleases, it has been the custom in all these cases, when the Court has found the defendant guilty, to have him remanded at once, and I make a similar request in
58 this case. No purpose would be served because this defendant should be sentenced. This is the first time they have asked for a probation report in this case.

Among the exhibits, your Honor has read as to his character. We are not impugning that. We do not consider this a venal offense, but we do consider it a deliberate offense against the laws of the Government.

However, if the defendant wants a probation, I feel he should be entitled to it.

Nevertheless, we do ask that he be remanded at this time.

The COURT: What do you expect a probation report will develop?

Mr. ADLERSTEIN: The reason I am asking for a probation report, I want to make a request similar to what is being done in California in these cases; Where it can be shown that a defendant is acceptable

for service by the Friends' Service Committee, the courts out there have, on occasion, where the facts warranted it, permitted a probation during a sentence, and also have allowed him to serve in some capacity which would be useful or beneficial to the national interests, and I would like to make this request, and I would like to get a little time to submit something on it and also to give some information to the probation officer so that he can consider it.

59 I know it has not been done here, but I think it is done in California. There is no reason why it cannot be extended to New York.

Mr. GROSSMAN: We have no such procedure available, if your Honor please.

Mr. ADLERSTEIN: I don't see why it cannot be available.

The COURT: What you mean is that it has not been done before.

Mr. GROSSMAN: Well, it hasn't been done in this district. During the war, I believe there was provision for camps and other things. But at this time there is no procedure available in New York City.

Mr. ADLERSTEIN: I would like to call your Honor's attention to the fact that new regulations have been adopted. These are work regulations, where people are assigned to work of national importance, under the new regulations, and I think the Court can consider those regulations, even though the defendant has been convicted.

The COURT: Isn't that, though, with respect to those who have been found to be conscientious objectors?

Mr. ADLERSTEIN: Yes. I simply said the Court could consider those regulations.

The COURT: Is it your contention that what is being done in California that upon conviction, the Court is nevertheless permitting people convicted to be then put in the class of those who have been found to be in fact conscientious objectors?

60 Mr. ADLERSTEIN: That is correct, your Honor.

The COURT: That is a most amazing situation to me.

Mr. ADLERSTEIN: I think I could show your Honor a copy of the judgment. I have it.

The COURT: I would be very interested in seeing it.

Mr. ADLERSTEIN: Would your Honor give me a minute to see if I can find it in my papers?

The COURT: Yes.

Mr. GROSSMAN: Your Honor, I am advised that on conviction every registrant is automatically put in 4F as a felon—

Mr. ADLERSTEIN: We are not asking for reclassification.

The COURT: It seems to me an extraordinary thing that a man convicted of violating the law then gets the classification in fact, if not in form, of a person who has been found to be a conscientious objector. It seems to me that that would make a mockery of the whole proceeding.

Mr. ADLERSTEIN: I would like to show your Honor a copy of the judgment. U.S.A. v. Donald Louis Wright.

61 The COURT: Yes, I have seen it, and it doesn't impress me.

Mr. GROSSMAN: Your Honor, may I point out that this man failed to report; he may have been classified as a conscientious objector—

The COURT: You need not argue about it. It doesn't impress me.

Mr. ADLERSTEIN: I cited this because it is something that has been done by a United States District Court.

The COURT: Yes, it has.

Mr. ADLERSTEIN: And I thought this Court might follow—

The COURT: I don't know what all the facts are there, but on the facts before me, I could certainly not make that disposition.

Mr. ADLERSTEIN: Will your Honor give me a chance, then, to inquire what the facts were, so that I can present them?

The COURT: No. Assuming that they were in all respects like this one, I wouldn't do it, and if the facts are different than this, then obviously it isn't applicable here.

Mr. ADLERSTEIN: Is it your Honor's ruling that you would allow no probation or no assignment to work of national importance under any circumstances?

62 The COURT: Once a man has been convicted and sentenced, he is out of the hands of the Court altogether. He is committed to the Attorney General for such disposition and punishment; according to law—

Mr. ADLERSTEIN: Yes, but according to the California Case—

The COURT: Yes, but in so far as that case may have been on all fours with this, it doesn't impress me as a case which I ought to follow, and I decline to follow, and in so far as the facts might be different, obviously it would not be relevant here.

Mr. ADLERSTEIN: Could I speak to the defendant, to find out about his sentencing, your Honor? It will just take a minute.

The COURT: Yes, you may.

Mr. ADLERSTEIN: If your Honor is not going to grant us anything regarding this request for assignment to work, I would like to ask for a postponement of sentence for one week, without the probation report, and also to continue the bail as previously requested, because there has been a case by Judge Irving Kaufman in which the bail was continued. It was tried a short time ago. I think it was the case of U. S. v. Romano.

The COURT: What is the objection to continuing him on bail for one week?

63 Mr. GROSSMAN: The man has been convicted of a crime, your Honor—

The COURT: I am really unfair in asking you that, because when I was down there where you are and was asked the question, I used

to make the argument which I think you are going to make word for word.

I am going to continue him on bail for one week from today, for sentence.

Mr. GROSSMAN: Your Honor, you don't want any probation report?

The COURT: No, no.

April 2nd, in this courtroom, at 10:30.

(Adjourned to April 2, 1952, at 10:30 o'clock a.m.)

64 UNITED STATES OF AMERICA

vs.

LESTER PACKER

New York, April 2, 1952,
10:30 o'clock a.m.

Present: Mr. Grossman, Mr. Adlerstein.

COLLOQUY RE SENTENCE

The CLERK: United States v. Lester Packer. Both sides ready?

Mr. GROSSMAN: The Government is ready.

The COURT: Is the defendant ready?

Mr. ADLERSTEIN: Yes, sir.

The COURT: Very well. Do you desire to make a statement?

Mr. GROSSMAN: Yes, your Honor, I desire to make a brief statement.

The COURT: All right.

Mr. GROSSMAN: I won't review the facts because I feel your Honor recalls full well all the evidence that went in last week, but I would just like to mention one or two highlights to your Honor. One of them is the fact that this defendant never made any claim as a conscientious objector in his original questionnaire, and it appears that it was a mere afterthought on his part; also the other important factor that he has no basis for religious belief at the present
65 time, judging by the evidence that came out at the trial, inasmuch as he is not attending church or temple at this time, and in fact, in Exhibit B he made the statement to Mr. Dykman that he had really not gone with the ritual of his religion. I think that is a very important factor in considering whether there was anything to his claim at all.

The COURT: Well, that question is not open here, as I understand it in any event.

Mr. GROSSMAN: Yes. I merely call it to your Honor's attention.

The COURT: Yes. Well, those are matters which Mr. Dykman

may have taken into consideration. I do not know that it is necessary to comment on the presence or absence of the defendant's adherence to some formal faith, or to a formal adherence to a particular faith, but those questions were all passed on at the hearing provided by law and, as I understand it, that question is not open to the defendant here.

Mr. GROSSMAN: I would also want, or would like to call your Honor's attention to the fact that this defendant was given every opportunity in the administrative hearings to be heard and to present every feature or form of his case that he had, and he was given every opportunity and every means was made available to him.

I can only state to your Honor that there has been a recent policy which has been established in the office with regard to recommendations, if your Honor desires to hear about it.

I can also state that we have had the cooperation of his attorney; that is, the cooperation of the defendant and his attorney with regard to waiving various technicalities.

The COURT: I will hear what recommendation you have to make.

Mr. GROSSMAN: The Government's recommendation in all these cases is five years, your Honor.

The COURT: And is that the recommendation you are making in this case?

The COURT: Very well. Counsel, do you desire to be heard?

Mr. ADLERSTEIN: Yes, sir.

The COURT: All right.

Mr. ADLERSTEIN: May it please the Court, I want to state first that this man's claim was no afterthought whatever. The actual fact of this case is that he made no claim originally because he did not know the law; that is to say, he did not know the law regarding filing when you claim to be a conscientious objector. He thought that you had to belong to a religious sect or organization to be heard. At one time, in fact, Mr. Dykman fell into the same error, thinking you had to belong to a religious sect or organization, because he wrote him to that effect, inasmuch as he said that they were objecting on that ground, or that that was one of the grounds of their objection to his claim, and I think that is definitely against the law or the particular statute involved here.

The COURT: I did not so read Mr. Dykman's opinion.

Mr. ADLERSTEIN: I may also refer to a letter which he wrote to this defendant in which he said that there was an objection to his claim, and if your Honor recalls, that was Defendant's Exhibit A.

Now, when he said, "I never went along with the ritual," I think the Court should see the distinction between the ritual and religion, or the basis or substance of religion because

UNITED STATES OF AMERICA VS. LESTER BACALAN 31

The COURT: Yes, you are right on that but, as I indicated before, counselor, those are matters which I think are not open here. I think those are matters which were properly presented to and passed on by Mr. Dykman.

Mr. ADLERSTEIN: Mr. Dykman also——

68 The COURT: I understand your point to be that Mr. Dykman used improper standards in arriving at his decision, is that it?

Mr. ADLERSTEIN: That is one of my contentions or points.

The COURT: Yes. I disagree with that, and I think that Mr. Dykman's opinion is not fairly susceptible of that interpretation.

Mr. ADLERSTEIN: Yes. Now, on the other hand, the statement was made here that we were given every opportunity to be heard. Well, I do say that we were given a pretty fair chance to be heard, but I do say nevertheless that the local board wrote him a letter and stated that they would not give him a hearing, and then it went to Col. Cobb, who suggested an appeal, but he did not have a hearing before the local board, even though he asked for an appeal, but he did not raise it as a technicality, and he did not have every opportunity as the U. S. Attorney stated.

Now, I have these notes here but I will skip what we have already covered. Even Peyton Ford said that this man was a conscientious objector, and it does show that the man was acting in good faith. The FBI report says the same thing, and in addition——

The COURT: Where is this letter from Peyton Ford that says that? I don't recall any such statement.

69 Mr. ADLERSTEIN: The letter is in the Government file which says that this man——

The COURT: Oh, I recall the letter from Peyton Ford, but I am just asking you to refresh me on that statement that you say is contained there. I don't recall that.

Mr. ADLERSTEIN: Oh, yes, it does make the statement.

The COURT: You may be right, and maybe Government counsel has it here and he can show it to me.

Mr. GROSSMAN: Government's Exhibit 2-Q, your Honor.

The COURT: All right.

Mr. ADLERSTEIN: I would like to say that these papers are very difficult to interpret in some cases, and it is very difficult for a draft board to judge the man's innocence or lack of good faith. This was pointed out by General Hershey in the letter which he wrote last Christmas in the Christmas message to the various local boards throughout the country, and this is what General Hershey says with regard to it:

“The basic difficulty lies in the absence of any accepted methods by which the beliefs and the sincerity of registrants may be tested.

70. The attempt to judge these attributes by what the registrants have done or have said permits a large area of error. Observation of a registrant is far from constant and witnesses are other human beings. These witnesses, moreover, are often prejudiced in favor if friendly, and contrariwise, if unfriendly. Their membership in a more standardized religious organization often adds rather than detracts from the exercise of tolerance to bring unusual methods in the exercise of the right to worship."

Now, this man did not belong to a religious sect or organization and, therefore, I say that in accordance with that letter, he did not get the standards that somebody who did belong would get, and nevertheless I say, in accordance with the Regulations and the law as I pointed out at the trial, that this man did comply and come within the law to be classified as a conscientious objector.

And the final thing I want to point out, your Honor, is that Mr. William Blackstone in his commentaries on the common law has said that conscience is superior to law, and that he thought a man had a right to follow his conscience when it does come into conflict with the law, and I think that is what this man has done, and the Court should consider that he is acting in good faith, and according to his own conscience when he has taken the stand that he has taken.

Then as Mr. Grossman has pointed out, I have cooperated
 71 as fully as possible with the Government to try to save expense and time in this case, and I did not raise any technicalities at all which I could have raised, and I think that the Court should consider that also.

That is all I have to say, your Honor, and I would like you to listen to the defendant, who has a few words to say.

The COURT: I will hear him.

The DEFENDANT: Well, as to the fact that I filed late, that was not of any relevant importance to Mr. Dykman, as he stated in his final report, and it is of absolutely no significance to the fact that I filed late as a conscientious objector.

I only wish to state my present views right now. I am convinced of the fact that however others might feel as to war, my study teaches me that its motives are contrary to the teachings of God, and, as I see it, the fundamental basis of religion is incompatible to the support of war, and if I am called upon to commit acts which violate my conscience, I must refuse to comply. This was upheld or affirmed before by the Allied courts at Nuremburg when it was declared that all men are normally responsible individuals and that there are certain decisions which men must make for themselves, and those decisions are decisions which cannot be made

72 for them by any supreme power or state; that among the decisions which all men must be personally responsible for is when they are called upon to commit crimes against human beings.

I consider war to be a crime against humanity, killing innocent men, women, and children. I do not believe that evil acts, no matter how well intended, can bring about good ends. I cannot see how the bayoneting, bombing, blasting, blockading and massacring innocent and guilty alike can come within the sanctions of God. I must have respect for the lives of all mankind and I must have respect for the life of an opponent. I feel that certain duties have been inculcated in me and I have had reasonable, adequate training so that I am opposed to war and I have been motivated in my religious belief in God and the divinity of man.

Now, the United States has contended—

The COURT: What was that last about the divinity of man?

The DEFENDANT: That is right.

Now, the United States Government has contended that I am insincere. I cannot acquiesce in that. My presence before this Court is the most valid witness I have to the sincerity of my belief, and I consider myself a conscientious objector, morally and religiously opposed to war.

The COURT: Have you completed your statement?

73 The DEFENDANT: Yes, sir.

The COURT: Do you desire to add anything to that?

Mr. ADLERSTEIN: I would just like to say that I do not think that he means that man is divine. I think he means that man has been given some qualities which are similar to His Nature. I think that is what he is referring to. I don't think man could actually be divine.

The COURT: Well, we need not get into a debate on that. The defendant apparently has prepared this statement with some care because he read it, of course, and whatever his meaning is, the use of those words I do not think is of importance here.

Stand up, please.

(The defendant arises in the courtroom.)

SENTENCE

The COURT: I now sentence you to the custody of the Attorney General for a term in such institution as he shall select, for a period of four years.

Mr. ADLERSTEIN: Thank you, your Honor.

Mr. GROSSMAN: Thank you, your Honor.

73a

GOVERNMENT EXHIBIT "2-P"

Report of Hearing Conducted by the Department of Justice

Preliminary Statement

Registrant resides at 1478 Walton Avenue, The Bronx, N. Y.

Form 100 was filed August 29, 1949.

Form 150 was filed October 31, 1950.

Registrant made no claim of conscientious objection in form 100, and was classified in Class 1-A on Sept. 28, 1949.

Thereafter his induction was cancelled and he was allowed to file form 150.

The Appeal Board reviewed the file on January 12, 1951 and transmitted it to the Department for an advisory opinion.

The file was transmitted to the hearing officer on April 5, 1951 and a hearing accorded registrant on May 7, 1951, the stenographic minutes of which were received by the hearing officer on July 9, 1951.

Statement of Facts

1. Registrant was born in New York City on April 4, 1929. After completing elementary and high school he took a course at Dale Carnegie Institute of Human Relations and while at public school also attended Zion Hebrew School. He has been employed since leaving high school by Gladys & Belle Inc., milliners, for which he is a merchandise buyer.

2. Registrant was born of Jewish parents but states in form 150 that he is a member of no religious sect or organization. He states in this form that his religious guidance comes from the dictates of his conscience and that, although he believes in a Supreme Being, he doesn't know whether his code of morals will be considered of a religious nature. He states that he received a brief religious training in his early years such as study of the Decalogue and religious prayer as well as moral training from his parents. He quotes a Chinese philosopher to the effect that human nature is good and arrives at the conclusion that 'minor good ends do not justify wholesale and indiscriminate slaughter of human life and destruction of war'.

3. The report of the Federal Bureau of Investigation indicates registrant in his early school days was not a robust child, his school record however shows nothing unfavorable. He has been employed by a millinery shop for the past seven years and is described as a hardworking and sincere employee. One of his references vouches for his character but considers his judgment concerning war immature. The other that his stand is not a matter of temporary politics or belief. Neighborhood report is favorable, one neighbor has

heard registrant express a personal aversion to war and its resultant source.

No credit or criminal record.

4. At the hearing registrant produced a statement, marked exhibit A, the signers of which he described as personal friends one of whom participated in the second German war and the other of whom he believes is not a conscientious objector. This statement certifies to the fact that registrant was a conscientious objector before registration and that his convictions are of a sincere nature. Neither 73c of the signers appeared at the hearing.

5. At the hearing registrant stated that his parents are very devout orthodox Jews; that he attended religious school from the age of 8 or 9 to that of 13 when he was confirmed. After that he attended the temple for a while and then began to discontinue attendance saying, "I had never really gone along with the ritual of my religion". Asked to state his present attitude, registrant said:

"Q. Tell me this; when you speak of the school, from 1940 to 1943, you went to Zion Hebrew School, 172d Street and Walton Avenue? A. That's right. I went to another school prior to that; it is no longer in existence and I cannot remember the name.

Q. But there you received instruction in the beliefs and Hebrew? A. That's right.

Q. Tell me what your present attitude is? A. I consider my religion to be a re-union of the essence of the human being; by that I mean. I feel that all human beings are naturally good; they have a certain divinity within themselves; to me God is not only external, he is internal; it is within all of us; as I mentioned in my statement, I felt that all people have a certain basic nature. I am sure that it is within the, the nature is the same with all beliefs of the world.

Q. Is this answer that you made here in your conscientious objector form, the answers to questions 2nd and third, do they pretty well express, that I hand you, your feelings? A. Yes, they do.

Q. Did you write that yourself without any help? A. Yes. I certainly did.

Q. So that it is not reproduction? A. Definitely."

The statement in answer to Questions 2 and 3 in form 150 begins: "I do not know whether my code of morals will be considered of a religious nature although I believe in a Supreme Being. This code may very well stem from this Supreme Being."

The registrant then states his early training "has probably had a definite bearing on his subconscious". He then writes, "Perhaps my belief can best be stated in the words of Mencius the immortal Chinese Philosopher when he said Human nature is good". The registrant then states that if men become evil it is not the fault of their original endowment since mercy, shame, a

sense of right and wrong, righteousness and propriety or moral consciousness is found in all men. From this he finds that international morality has never sunk so long as now. He closes as follows:

"I believe that no man has the right to take the life of another human being regardless of circumstances. We are put on earth by the will of God and by the will of God we shall depart".

Asked where he acquired this belief he stated they had been slowly developed within himself, "perhaps my religious training, that I had always been taught to love my neighbor, ten commandments 'Thou shalt not kill'; I have always accepted these laws in practical loving; I have used this attitude towards my friends.

Asked to explain why no claim of conscientious objection had been made until after he was classified in Class 1-A, registrant stated he had acted on the advice of friends to wait until he found whether he was physically fit for service before making such a claim.

Conclusion

Registrant received religious training in a faith which is not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form.

Registrant has been allowed to make a claim for exemption 73e and in reaching his conclusion the hearing officer has given no significance or weight to the fact that no statement of conscientious objection was made in form 100. It has been stated in this report that such was the fact because it is believed to be part of a complete statement.

The present case in the opinion of the hearing officer is one in which the registrant has failed to establish by sufficient evidence that his opposition to war arises from religious training and belief.

Recommendation

That registrant's claim for exemption from combatant and non-combatant training or service in the armed forces be denied and he be classified in Class 1-A.

(Signed) JACKSON A. DYKMAN,
Hearing Officer.

73f

DEFENDANT'S EXHIBIT "A"

Department of Justice

Washington, D. C.

Jackson A. Dykman,
Special Assistant,
177 Montague Street,
Brooklyn 2, N. Y.

May 2, 1951.

Mr. LESTER PACKER,
1478 Walton Avenue,
The Bronx,
New York, N. Y.

Dear Sir:

In reply to your letter of April 29 you are advised that there is no evidence before me unfavorable to your claim as a conscientious objector except the fact that in your classification questionnaire form 100 you made no claim of conscientious objection and in your special form for conscientious objector you stated that you are not a member of a religious sect or organization.

Very truly yours,

(Signed) Jackson A. Dykman,
Hearing Officer.

73g

DEFENDANT'S EXHIBIT "B"

Minutes of hearing conducted by the Department of Justice pursuant to the Selective Service and Training Act of 1948.

In re LESTER PACKER

Appeal from Local Board No. 22, 1910 Arthur Avenue, Bronx 57

Appeal Board Panel 4, 350 Fifth Avenue, New York 1, New York

United States Attorney, Frank J. Parker, Eastern District of
New York

Hearing Officer, Col. Jackson A. Dykman

Shorthand Reporter, Elvira C. Rust

May 7, 1951

Q. Mr. Packer, you are claiming exemption from both combatant and non-combatant military service?

A. That's right.

Q. In your special form for conscientious objector you say that you are not a member of any religious sect or organization, do you mean that?

A. Yes, well, I don't belong to any particular organization, but I do consider myself religious.

Q. I have no doubt of that but I just want to straighten this out?

A. Yes, sir.

73h Q. You are born of Jewish parents?

A. That's correct.

Q. Tell me, as a small boy; what if any religious training you have had?

A. I went to religious school, I believe from the age of about 8 or 9 until I was 13 and then I received my confirmation at that age.

Q. Your Bar Mitzvah?

A. That's right.

Q. After that did you go to the Temple regularly? Did your parents go?

A. My parents are very devout people; I went for a short while and then I more or less began to discontinue it; I had never really gone along with the ritual of my religion.

Q. Your parents are orthodox?

A. Sure.

Q. Tell me this, when you speak of the school, from 1940 to 1943, you went to Zion Hebrew School, 172nd Street and Walton Avenue?

A. That's right. I went to another school prior to that; it is no longer in existence and I cannot remember the name.

Q. But there you received instruction in the beliefs and Hebrew?

A. That's right.

Q. Tell me what your present attitude is?

A. I consider my religion to be a re-union of the essence of the human being; by that I mean; I feel that all human beings are naturally good; they have a certain divinity within themselves; to me God is not only external, he is internal; it is within all of us; as I mentioned in my statement, I felt that all people have a certain basic nature, I am sure that it is within the, the nature is the same with all beliefs, of the world.

73i Q. Is this answer that you made here in your conscientious objector form, the answers to questions 2nd and third, do they pretty well express, that I hand you, your feelings?

A. Yes, they do.

Q. Did you write that yourself without any help?

A. Yes, I certainly did.

Q. So that it is not production?

A. Definitely.

Q. Are there any circumstances, Mr. Packer, under which you would be willing to fight for some cause or use force to resist anything at all?

A. Well, let me say I believe in spiritual force and not in violence; I have always followed the philosophy of not hating an enemy, by hating him, is seen as something that I might try to enforce upon him; as far as resistance goes, I feel that one can accomplish more by trying to influence your opposition and showing a little love rather than using hatred and by emotions in trying to force a certain issue; to my belief, violence has never accomplished anything.

Q. Where do you think you acquired that belief and those feelings?

A. It is something that I have slowly developed within myself; of course, certain things are basic in me; as I mentioned in my statements, certain basic natures which we all have; perhaps, I am more aware of those natures than other people are.

Q. What I want to know is, was there any particular person who taught you this, or any particular book that you got it out of; what is the source of it? What do you think made you feel this way?

A. Perhaps the destruction in the last war; perhaps my religious training, that I had always been taught to love my neighbor, ten commandments, "Thou shalt not kill"; I have always accepted those laws in practical living; I have used this attitude towards my friends and acquaintances.

Q. What is the explanation of the fact that when you made out your registration or classification questionnaire, you did not make any claim of conscientious objector?

A. I had intended to be a conscientious objector if I were called to participate in military service; my friends, rather my close friends were aware of this; and at the time of my registration when I had made my intentions more explicit to them, they sort of advised me that, you don't know if you could even possibly pass your physical, why go looking for trouble now; why not wait and see; not knowing the procedure of a conscientious objector and not realizing that my rights would expire after a certain time, I took this advice.

Q. Well, you have been allowed to make your claim, so that part of it is all right, but you were waiting to see, before making your declaration of your attitude, you were waiting to see what would happen to you, on the basis of what would happen to you for physical reasons?

A. That's right.

Q. Anything that you would like to add to what you have said?

A. Yes, what my friends have said; and I have a statement here; my friends signed that statement themselves.

Q. Who is Arthur Miller?

A. He is my personal friend; I have known him for a number of years.

73k Q. How old is Mr. Miller?

A. About 23.

Q. Mr. Liebman?

A. He is about 22. Mr. Miller does not hold the same opinion that I do but believes it to be sincere; I did participate in military service in the last war.

Q. Mr. Liebman did not? Is he also an objector?

A. I don't believe so.

Col. Dykman: I will mark this paper, To whom it may concern, signed Arthur Miller, Mr. Liebman, Exhibit A. There is nothing derogatory to you, Mr. Packer, in the FBI report; there is nothing you have to meet, employment record is favorable and your friends and neighbors seem to confirm your attitude?

A. All right.

Q. If you have anything more you would like to say?

A. I might add that I will always be willing to participate in any sort of—I would be willing to assist in any welfare organization that the Government might establish, any humanitarian organization, rehabilitation work; I would be in favor of that; I would be willing to give my service in anything that will be creative but not destructive.

Q. But you would not be willing to serve in the non-combatant branch of the Army?

A. It is an integrated branch of military service and by supporting that branch, I will be supporting the war.

(Witness excused.)

JUDGMENT AND COMMITMENT—April 2, 1952

On this 2nd day of April 1952 came the Attorney for the government and the defendant appeared in person and by counsel

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by the Court (Jury Waived) of the offense of fail and neglect to take one step forward after it had been determined that the defendant was fully qualified for induction into the Armed forces of the United States Title 50 Sec. 462 U. S. C. as charged and the court having asked the defendant whether he has anything to say why judgment should not be

pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four Years.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN F. X. MCGOHEY, JR.,
United States District Judge.

United States District Court. Filed April 2, 1952. Southern District of New York.

75 In United States District Court

NOTICE OF APPEAL—April 4, 1952

Lester Packer, the above named defendant, hereby appeals to the Court of Appeals for the Second Circuit from a Judgment by this Court on the 2nd day of April 1952, committing the defendant to the custody of the Attorney General for a period of four years, as a result of his conviction for the offense of refusing to take one step forward for induction into the armed forces of the United States in violation of 50 U. S. C. 462; and defendant further appeals from the Order made February 29, 1952 and entered March 3, 1952 in the Office of the Clerk of this Court; wherein the Court quashed a subpoena duces tecum and denied a motion to inspect the report of the Federal Bureau of Investigation herein.

Dated April 4, 1952.

HERMAN ADLERSTEIN,
Attorney for Defendant,
79 Wall Street,
New York 5, N. Y.

76 In the United States Court of Appeals for the Second Circuit

STIPULATION EXTENDING TIME TO DOCKET RECORD ON APPEAL

It is hereby stipulated and agreed by and between the United States Attorney for the Southern District of New York on behalf of appellee and the attorney for the appellant, that the time of the appellant to file and docket the record on appeal herein be and the

same is hereby extended to and including the 14th day of October, 1952.

Dated: New York, N. Y., September 30, 1952.

MYLES J. LANE, by D.J.G.

United States Attorney.

HERMAN ADLERSTEIN,

Attorney for Appellant.

So Ordered.

ALEXANDER M. BELL,

Clerk, Court of Appeals

77

In United States District Court

STIPULATION AS TO RECORD AND EXHIBITS—October 8, 1952

The appellant herein and his counsel have represented and hereby represent to the appellee:

(1) That this transcript of the record contains all matter necessary fairly to present their points and such points as are relevant in reply.

(2) That in so far as the transcripts of record purports to contain the stenographic minutes of proceedings, the minutes are set forth accurately and omissions, if any, are clearly marked. Such omissions are only of matter wholly immaterial to any question raised on this appeal.

(3) That the only Exhibits reprinted herein are Government Exhibit "2-P" and Defendant Exhibits "A" and "B", but any other exhibits deemed material will be handed up to the Court upon the argument by either side.

(4) That the transcript of the record contains all matters required to be set forth by applicable rules.

In reliance upon these representations it is hereby stipulated and agreed by the undersigned that the foregoing is a true copy of the transcript of record of the District Court for the Southern District of New York in the above entitled matter as agreed on by the parties, and further, that all the exhibits pertaining to this cause not reproduced herein, may be submitted to the Court upon the argument of the appeal, with the same force and effect as if reproduced herein and, further, if it should appear to the appellee that matter properly a part of the transcript of record has been omitted and has become material, despite the representations herein made, the appellee may, at its option, reprint such matter as an appendix to its brief or may require the appellant to reprint

78

such matter, and use such matter with the same force and effect as if reproduced herein.

Dated October 8, 1952.

MYLES J. LANE,

Attorney for Plaintiff-Appellee.

HERMAN ADLERSTEIN,

Attorney for Defendant-Appellant.

Clerk's Certificate to foregoing paper omitted in printing.

79 United States Court of Appeals for the Second Circuit, October Term, 1952

No. 116

Argued December 11, 1952

Docket No. 22514

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

against

LESTER PACKER, DEFENDANT-APPELLANT

OPINION—December 31, 1952

Before: AUGUSTUS N. HAND, CLARK and FRANK, *Circuit Judges*

Appeal from the United States District Court for the Southern District of New York. John F. X. McGohey, Judge

The defendant appeals from a judgment of conviction and sentence for violation of 50 U. S. C., Appendix §462 because of his failure to take the symbolic "one step forward" which would have constituted his induction into the armed forces of the United States, after it had been determined that he was fully qualified for induction. *Reversed.*

80 Herman Adlerstein, Attorney and counsel for defendant-appellant.

Myles J. Lane, United States Attorney; Daniel H. Greenberg, Thomas F. Burchall, Jr., and Silvio J. Mollo, Assistant United States Attorneys, for United States of America, plaintiff-appellee.

PER CURIAM:

The defendant was convicted for violation of 50 U. S. C., Appendix §462 in failing to take the symbolic "one step forward" required

for his induction into the armed forces. The government argues that he waived the claim to be classified as a conscientious objector, which he is now asserting, because he did not set it forth in his answer to the selective service questionnaire. He was, however, later given by his Draft Board a form to fill out for the statement of his claim. When the Board declined to reopen his classification, the Director of Selective Service of New York City wrote the Local Board, saying that since the defendant had been furnished with the form on which to make his contention, "[t]his may be considered indicative on the part of the Local Board to reopen and reconsider the registrant's claim anew. If this could be considered a reopening, then, pursuant to the regulations, the registrant should have been mailed a new notice of classification, SS Form 110, and thereafter his rights to appeal could have been extended an additional ten days. Rather than sending out a new SS Form No. 116 [sic] at this time, it is suggested that his notice of induction be cancelled and that his case be sent to the Appeal Board, on the questions of objection to combatant and non-combatant 81 duty as a conscientious objector." Government's Exhibit 2K. Transcript of Record, p. 30.

Since the Local Board cancelled the defendant's order of induction and he was allowed to take an appeal to the Appeal Board, which classified him in 1A, it is our opinion that the Local Board permitted the reopening of his case and that any previous waiver may not now be claimed by the government. See 32 C. F. R. 1625.2.¹

Moreover, the letter from the Director of Selective Service for the City of New York, considered under 32 C. F. R. §1604.13 as a

¹ §1625.2 When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant upon the written request of the registrant, * * * if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction. * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

State Director, may be regarded as a request that the Local Board reopen the defendant's case. 32 C. F. R. § 1625.3.²

At the hearing before the Hearing Office of the Department of Justice the defendant was denied the right to see the F. B. I. report on which the eventual recommendation of the Department of Justice to the Appeal Board that the defendant's claim as a conscientious objector be denied was in part based. In *United States v. Nugent* (November 10, 1952), (2d Cir.), — F. 2d —, we held
82 such a denial to be reversible error. It is true that in the case at bar the defendant was told that the F. B. I. report was altogether favorable to him. But the correctness of such a representation was in our opinion a matter which the defendant was entitled to judge for himself by seeing the original F. B. I. record. On the authority of our decision in *United States v. Nugent*, *supra*, the judgment is

Reversed.

83-84 United States Court of Appeals for the Second Circuit

UNITED STATES, PLAINTIFF-APPELLEE

v.

LESTER PACKER, DEFENDANT-APPELLANT

JUDGMENT—December 31, 1952

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,

Clerk.

85 Clerk's Certificate to foregoing paper omitted in printing.

² §1625.3 When registrant's classification shall be reopened and considered anew. The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service * * * and upon receipt of such request shall immediately cancel any Order to Report for Induction * * * which may have been issued to the registrant.

Form approved
Budget Bureau No. 33-R102

SELECTIVE SERVICE SYSTEM

CLASSIFICATION QUESTIONNAIRE

Selective Service No.

Date of mailing 7-19-49

Date of birth: 4-4-29

(Month) (Day) (Year)

Name:

Packer Lester

(Last)

(First)

(Middle)

Address: 1478 Walton Av.

(Number and street or R. F. D. route)

Bx.-NY

(City, town, or village)

(Zone)

(County)

(State)

SELECTIVE SERVICE

LOCAL BOARD

1910 AMER. AVE.

BRONX 57, NEW YORK
(STAMP OF LOCAL BOARD)

NOTICE TO REGISTRANT

You are required by the Selective Service Regulations to fill out this questionnaire truthfully and to return it to

Statements in this questionnaire are confidential as prescribed in the Regulations

(P.53)

USE INK OR TYPEWRITER IN FILLING OUT THIS FORM

STATEMENTS OF THE REGISTRANT

Series I.—IDENTIFICATION

INSTRUCTIONS.—Every registrant shall complete all statements in this series.

1. My name is (print) LESTER PACKER
(Last) (First) (Middle)
2. In addition to the name given above, I have also been known by the name or names of _____
(If none, write "None")
3. My address now is 1478 WALTON AVE
(City, town, or village) (Zone) (County) (State)
(Number and street or R. F. D. route)
4. My telephone number now is NONE
(Town) (Exchange) (Number) (If you have no phone, write "None.")
5. My Social Security number is 065-22-8327
(If none, write "None")

Series II.—PRESENT MEMBERS OF ARMED FORCES

INSTRUCTIONS.—Every registrant who is a member of one or more of the groups named in this series shall supply the information called for under the appropriate item or items.

1. (a) I am at present on ACTIVE DUTY in the Armed Forces, the Coast Guard, the Coast and Geodetic Survey,

Note

For lower portion of this
page see next frame.

Series II.—PRESENT MEMBERS OF ARMED FORCES

INSTRUCTIONS.—Every registrant who is a member of one or more of the groups named in this series shall supply the information called for under the appropriate item or items.

1. (a) I am at present on ACTIVE DUTY in the Armed Forces, the Coast Guard, the Coast and Geodetic Survey, or the Public Health Service as a _____ in the _____
(Grade, rank, or rating) (Branch of Armed Forces)

(b) Service or serial number _____ (c) I entered on active duty _____
(Date)

(d) My present tour of active duty will terminate _____
(Date)

2. (a) I am at present a member of a reserve component of the Armed Forces, NOT ON ACTIVE DUTY as a _____ in the _____
(Grade, rank, or rating) (Branch of Armed Forces)

(b) I entered into such component on _____
(Date)

(c) I _____ performing service in such component by satisfactorily participating in scheduled drills and training periods as prescribed by the Secretary of Defense.
(am, am not)

3. (a) I am at present (check appropriate box) enrolled in the advanced course, senior division, Reserve Officers' Training Corps ☐ or the Air Reserve Officers' Training Corps ☐; a member of the Naval Reserve Officers' Training Corps entered upon the junior or senior year ☐; a midshipman, United States Naval Reserve ☐; in the _____
(College or university)

(b) I acquired such status on _____
(Date)

4. (a) I am selected for enrollment or continuance in the senior division, Reserve Officers' Training Corps ☐; the Air Reserve Officers' Training Corps ☐; the Naval Reserve Officers' Training Corps ☐; I am appointed a midshipman, United States Naval Reserve ☐; and I have agreed in writing to accept a commission if tendered and to serve, subject to call by the Secretary of the Army, the Secretary of the Air Force, or the Secretary of the Navy, not less than 2 years on active duty after receipt of a commission.

(b) I was selected on _____ (c) The above agreement was signed _____
(Date) (Date)

- (P. 54)
5. I am a fully qualified and accepted aviation cadet applicant of the (check appropriate box) Army ☐; Navy ☐; Air Force ☐; and have signed an agreement of service for a period commencing on _____ (Date) and ending _____ (Date)

Series III.—PRIOR MILITARY SERVICE

INSTRUCTIONS.—Every registrant who has been on active duty as a member of the Armed Forces of the United States, the Coast Guard, the Public Health Service on active duty with the Armed Forces or the Coast Guard, or the armed forces of an allied country, shall complete the statements in this series. (Use a separate line for each term of service, listing last service first. If none, write "None.")

1. Branch of Armed Forces (Last service)	Date of Entry Into Active Service (Month, Day, Year)	Date of Separation From Active Service (Month, Day, Year)	Type of Discharge (Honorable, Dishonorable, Bad Conduct, Undesirable, or other—Specify)
None			

2. Does service shown in Item 1 above include any time spent in attending any of the specialized or college training programs under the jurisdiction of the Army, Navy, Marine Corps, or Coast Guard; or as a cadet, or midshipman in one of the armed service academies? Yes ☐; No ☒.
3. If your answer to Question 2 is "Yes," give the name of the program _____ date of entry _____ (Month) (Day) (Year) and date of release _____ (Month) (Day) (Year) from such specialized training or academy.

Series IV.—OFFICIALS DEFERRED BY LAW

1. I am at present the Governor of a State, Territory, or Possession; a public official chosen by the voters of an entire State, Territory, or Possession; a member of the legislative body of the United States or of a State, Territory, or Possession; a judge of a court of record of the United States or of a State, Territory, or Possession or the District of Columbia; my office is _____ (If none, write "None")
2. My term of office expires _____ (Date)

Series V.—SOLE SURVIVING SON

I AM NOT the sole surviving son of a family of which one or more sons or daughters were killed in action or died in line of duty while serving in the Armed Forces of the United States or subsequently died as a result of injuries received or disease incurred during such service. (am, am not)

Series VI.—MINISTER, OR STUDENT PREPARING FOR THE MINISTRY

INSTRUCTIONS.—Every registrant who is a minister or a student preparing for the ministry shall complete the statements in this series that apply to him.

1. (a) I _____ a minister of religion. (b) I _____ regularly serve as a minister.

2. My term of office expires _____ (Date)

Series V.—SOLE SURVIVING SON

I AM NOT the sole surviving son of a family of which one or more sons or daughters were killed in action or died in line of duty while serving in the Armed Forces of the United States or subsequently died as a result of injuries received or disease incurred during such service. (am, am not)

Series VI.—MINISTER, OR STUDENT PREPARING FOR THE MINISTRY

INSTRUCTIONS.—Every registrant who is a minister or a student preparing for the ministry shall complete the statements in this series that apply to him.

1. (a) I _____ a minister of religion. (b) I _____ regularly serve as a minister. (am, am not) (do, do not)

(c) I have been a minister of the _____ since _____ (Name of sect or denomination) (Month) (Day) (Year)

(d) I _____ been formally ordained. (e) If so, my ordination was performed on _____ (have, have not) (Month) (Day) (Year)

by _____ at _____ (Ecclesiastical official performing the ordination) (City and State)

2. (a) I _____ a student preparing for the ministry under the direction of _____ (am, am not)

_____ in a theological or divinity school. (Name of church or religious organization)

(b) I am attending the _____ (Name of theological or divinity school)

located at _____

3. I _____ a student preparing for the ministry under the direction of _____ (am, am not)

_____ pursuing a full time course of instruction leading to my entrance into _____ (Name of church or religious organization)

located at _____ (Name of theological or divinity school)

in which I have been pre-enrolled.

(P.55)

Series VII.—FAMILY STATUS AND DEPENDENTS

INSTRUCTIONS.—Every registrant shall complete this series.

1. (a) I have never been married ☒; I am a widower ☐; I am divorced ☐; I am married ☐. (b) I ☐ (do, do not) live with my wife; if not, her address is _____

(c) We were married at _____ (Place) on _____ (Date)

2. (a) I have none children under 18 years of age.
(Number) (If none, write "None")

(b) Of these children, _____ live with me in my home.
(Number)

3. I have no persons other than those shown above, wholly or partially dependent upon me for support.
(Number)

NOTE.—Every registrant should submit to the local board on a separate sheet attached to this questionnaire any additional information concerning his status with respect to persons dependent upon him for support which he believes should be considered by the local board.

Series VIII.—PRESENT OCCUPATION

1. Every registrant must check each of the following boxes appropriate to his case and follow the instructions indicated.

(a) I am now working on a farm, orchard, or ranch. ☐ { If this box is checked, complete Series IX.

(b) I am now working in a nonagricultural occupation. ☐ { If this box is checked, complete this series.

(c) I am now a full-time student. ☐ { If this box is checked, complete Series XI.

(d) I now have no employment nor am I a full-time student. ☐ { If this box is checked, complete Parts 7 and 8 of this series.

2. The job I am now working at is (give full title, for example: Construction draftsman, turret-lathe operator, stationary engineer, farm laborer, prosecuting attorney, physics teacher, policeman, marriage-license clerk, etc.):

MILLINERY Buyer

3. I do the following kind of work in my present job (Be specific. Give a brief statement of your duties.):

PURCHASE MILLINERY SUPPLIES

4. In my present job, I am (Check one box only) —

(a) A regular or permanent employee, working for salary, wages, commission, or other compensation ☒

2. The job I am now working at is (give full title, for example: Construction draftsman, turret-lathe operator, stationary engineer, farm laborer, prosecuting attorney, physics teacher, policeman, marriage-license clerk, etc.):

MILLINERY Buyer

3. I do the following kind of work in my present job (Be specific. Give a brief statement of your duties.):

PURCHASE MILLINERY SUPPLIES

4. In my present job, I am (Check one box only) —

(a) A regular or permanent employee, working for salary, wages, commission, or other compensation ☒

I have worked 4 1/2 years in my present trade, and I do expect to continue indefinitely in it.
(do, do not)

(b) A temporary or occasional employee ☐; I expect that my present job will end about _____ (Date)

(c) An apprentice under a written or oral agreement with my employer, which expires _____ (Date) ☐

(d) An independent worker, working on my own account, not hired by anyone, and not hiring any help ☐

(e) Working for my father or for the head of my family, but receiving no pay ☐

(f) An employer or proprietor hiring _____ paid workers ☐.
(Number)

5. My employer is CHARLES & BECK INC.

(Name of organization or proprietor, not foreman or supervisor; write "Self" if self-employed)

20 W. 57 ST.

(Address or place of employment—Street, or R. F. D. Route, City, and State)

whose business is

MILLINERY MANUFACTURER

(Nature of business, service rendered, or chief product)

6. (a) I was employed by present employer on SEPT 1944

(Date)

(b) I entered job described in Statements 2 and 3, this series, on SEPT 44

(Date)

(P.56)

(c) I am paid at the rate of \$ _____ per hour ☐; day ☐; week ☐; month ☐.
(Check appropriate box)

(d) I work an average of _____ hours per week.

7. Other business or work in which I am now engaged is _____
(Nature of business; if none, write "None")

8. Prior work experience _____

NOTE.—You may attach to this page a statement giving additional information which you think the local board should consider in determining your classification, which statement will then become a part of this questionnaire. Your employer may submit to the local board any information concerning your employment which he thinks the local board should consider in determining your classification.

Series IX.—AGRICULTURAL OCCUPATION

INSTRUCTIONS.—Every registrant who works on a farm, orchard, or ranch shall complete this series.

1. I work on or operate a farm, orchard, or ranch as (Check appropriate boxes)—

- (a) Sole owner-operator of the farm ☐.
- (b) Joint owner-operator with _____ (Name) _____ (Address) ☐.
- (c) Hired manager for _____ (Name) _____ (Address) ☐.
- (d) Cash tenant or renter ☐. } My agreement with _____ (Name of landlord)
- (e) Standing rent tenant ☐. } expires _____ (Month) _____ (Day) _____ (Year)
- (f) Share cropper ☐. }
- (g) Share tenant ☐. }
- (h) Wage hand (hired man) ☐. _____ (Name and address of employer)
- (i) Unpaid family worker ☐.

2. I have been engaged in farm work continuously since _____ (Date) 3. I _____ live on the farm where I work.
(do, do not)

4. I _____ actually and personally responsible for the operation of the farm where I work.
(am, am not)

5. The principal crops and livestock of the farm I operate or work on are:

Names of Crops	Acres Devoted to Each	Kinds of Livestock	Number of Each Now on Farm

2. I have been engaged in farm work continuously since _____ (Date) 3. I _____ live on the farm where I work.
(do, do not)

4. I _____ actually and personally responsible for the operation of the farm where I work.
(am, am not)

5. The principal crops and livestock of the farm I operate or work on are:

Names of Crops	Acres Devoted to Each	Kinds of Livestock	Number of Each Now on Farm

6. Total value of products sold from this farm during the last crop year \$ _____

7. Principal products marketed during the last two years _____

8. The number of year-round workers on this farm is _____ of whom _____ are hired hands.
(Number) (Number)

9. I am paid at the rate of \$ _____ per hour ☐; day ☐; week ☐; month ☐.
(Check appropriate box)

10. Other facts which I consider necessary to present fairly the farming or farm work I have described and my connection with it as a ground for classification are (if none, write "None") _____

11. Other business or work in which I am now engaged _____
(Nature of business; if none, write "None")

12. Prior work experience _____

NOTE.—You may attach to this page a statement giving any additional information which you think the local board should consider in determining your classification, which statement will then become a part of this questionnaire. Your employer may submit to the local board any information concerning your employment which he thinks the local board should consider in determining your classification.

(P. 57)

Series X.—EDUCATION

1. I have completed 7 years of elementary school, 3 years of junior high school, and 3 1/2 years of high school.
(Number) (Number) (Number)

2. I was graduated from high school.
(was, was not)

3. I have had the following schooling other than elementary and high school (if none, write "None"):

Name of College, University, Preparatory, Trade or Business School	Course of Study	Length of Time Attended, Degrees or Certificates Granted
C.C.N.Y.	MERCHANDISING	

Series XI.—STUDENTS

INSTRUCTIONS.—Every registrant who is a full-time high school or college student, except those who have completed Series VI above, shall complete this series. A student who believes that he should be placed in a deferred class because of his student status should file with the local board the necessary supporting evidence.

1. (a) I am a full-time student at _____
(Name of institution)

located at _____, majoring in _____

preparing for _____
(Occupation or profession)

(b) I expect to receive from this institution a _____
(Kind of certificate, diploma, or degree; if none, write "None")

on _____
(Date)

Note

For lower portion of this page see next frame.

preparing for _____

(Occupation or profession)

(b) I expect to receive from this institution a _____

(Kind of certificate, diploma, or degree; if none, write "None")

on _____

(Date)

(c) I intend to take an examination for license in _____

(Profession) (If none, write "None")

on _____

(Date)

Series XII.—CITIZENSHIP

INSTRUCTIONS.—Every registrant shall complete the statements numbered 1, 2, 3, and 4 in this series. Every registrant who is not a citizen of the United States shall also complete the statement numbered 5 when applicable.

1. I was born at _____

(Town or county)

(State)

(Country)

on _____

(Date)

2. My race is White ☒; Negro ☐; Oriental ☐; Indian ☐; Other ☐ _____

(Specify)

3. I am a citizen or subject of _____

(Country)

4. I _____

(have, have not)

filed a Declaration of Intention

to become a citizen of the United States.

5. I filed my Declaration of Intention at _____

(City) (State)

on _____

(Month) (Day) (Year)

under No. _____

Series XIII.—COURT RECORD

INSTRUCTIONS.—Every registrant shall complete this series.

1. I have been convicted of crimes, other than minor traffic violations, as recorded below; if none, write "None."
List all convictions, last conviction first.

Offense	Date of Conviction (Month, Day, Year)	Court. (Name and Location)	Sentence
(Last conviction) None			

2. I am not now being retained in the custody of a court of criminal jurisdiction, or other civil authority.

(am, am not)

Specify _____

(Awaiting trial, on parole, etc.)

(6)

—12—32764-1

NOTICE TO REGISTRANT

You are required by the Selective Service Regulations to fill out this questionnaire truthfully and to return it to this local board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment.

THIS QUESTIONNAIRE MUST BE RETURNED ON OR BEFORE 7-29-49

Joe Drumm
Clerk or Member of Local Board.

(The above items are to be filled in by the local board before the questionnaire is mailed to the registrant.)

INSTRUCTIONS

This questionnaire is intended to furnish the local board with information to enable it to classify you. You will receive notice from your local board of your classification.

The registrant is required to sign the certificate on page 7. If another person assists the registrant in completing this questionnaire, the person assisting is required to complete the statement following the registrant's certificate. Imprisonment for not more than five years or a fine of not more than \$10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making, or being a party to the making, of any false statement or certificate regarding or bearing upon a classification.

If the registrant is an inmate of an institution and is unable to complete the questionnaire, the executive head of the institution shall communicate these facts immediately to the local board.

1. Make no alterations in the printed matter in this questionnaire.

2. All spaces in this questionnaire that apply to registrants must be completed with the appropriate words or check marks.

3. If you furnish additional information or affidavits with your questionnaire, attach the same securely to it.

4. If you are now on active duty with the Armed Forces, obtain a certificate to that effect from your commanding officer. Execute only Series I and II of the questionnaire and return it, with certificate attached, to your local board.

5. After this questionnaire has been returned, report to your local board at once any change of address, any change in place of employment or occupation, or any other new fact which may affect your classification.

Series XIV.—CONSCIENTIOUS OBJECTION TO WAR

(P, 58)

INSTRUCTIONS.—Any registrant who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form shall sign the statement below requesting a Special Form for Conscientious Objector (SSS Form No. 150) from the local board.

By reason of religious training and belief I am conscientiously opposed to participation in war in any form and for this reason hereby request that the local board furnish me a Special Form for Conscientious Objector (SSS Form No. 150) which I am to complete and return to the local board for its consideration.

(Signature)

Series XV.—PHYSICAL CONDITION

INSTRUCTIONS.—Every registrant shall complete this series. Any registrant who answers any of the questions listed below by "Yes" and who believes himself physically disqualified for service in the Armed Forces may attach an affidavit from his physician, hospital, or sanatorium to support his claim.

1. Do you have any physical or mental condition which, in your opinion, will disqualify you from service in the Armed Forces? Yes ☐; No ☒.
2. If the answer to Question 1 is "Yes," state the condition from which you are suffering _____
3. Are you now, or have you ever been, an inmate or a patient in a mental hospital or institution? Yes ☐; No ☒.
4. Are you now, or have you ever been, an inmate or a patient in a tuberculosis hospital or sanatorium? Yes ☐; No ☒.
5. If the answer to Question 3 or Question 4 is "Yes," give the name and address of each hospital, institution, or sanatorium _____
6. Have you had treatment from a physician for any condition within the last 5 years? Yes ☐; No ☒.
7. If the answer to Question 6 is "Yes," state each condition from which you suffered and give the name and address of the physician who attended you, and dates of each treatment _____

REGISTRANT'S STATEMENT REGARDING CLASSIFICATION

INSTRUCTIONS.—It is optional with registrant whether or not he completes this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, which will be taken fully into consideration regardless of whether or not this statement is completed.

In view of the facts set forth in this questionnaire it is my opinion that my classification should be Class _____

The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the local board in determining his classification.

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—1. Every registrant shall make the registrant's certificate. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the person who assists him in completing this questionnaire. 3. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

determine the classification of the registrant on the basis of the facts before it, which will be taken fully into consideration regardless of whether or not this statement is completed.

In view of the facts set forth in this questionnaire it is my opinion that my classification should be Class _____

The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the local board in determining his classification.

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—1. Every registrant shall make the registrant's certificate. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the person who assists him in completing this questionnaire. 3. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than \$10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Selective Service Law of 1948.)

I, Lester Tucker, certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing _____ in my own handwriting.

Registrant sign here

(Signature or mark of registrant)

(Signature of witness to mark of registrant)

(Signature of witness to mark of registrant)

If another person has assisted the registrant in completing this questionnaire, such person shall sign the following statement:

I have assisted the registrant herein named in preparation of this questionnaire because _____

(For example—registrant unable to read and write English, etc.)

(Signature of person who has assisted)

(P.59)

(Registrants Will Make No Entries on This Page)

Dates	Minutes of Actions by Local Board and Appeal Board	Vote	
		Yes	No
8/29/49	Form m. reg. to give info. to comp. quest.		
9/2/49	Form m. reg. giving info.		
9/28/49	Class I A 468 (B) - FHS	3	0
10/20/49	9.110 a.e. m. reg		
9/27/50	Form m. reg.		
10/9/50	Form m. reg.		
10/23/50	F.150 SENT (CONS. OBJECTOR) PER LETTER 10/20/50		
10/31/50	F.150 REC. ATTACHED.		
11/1/50	classification unchanged		
11/1/50	Regadvised class unchanged.		
11/9/50	SEE LETTER REQUEST HEARING ATTACHED		
11/1/50	regadvised hearing requested		
11/17/50	12/6/50		
11/22/50	file sent to Mj. Akst. per telephone conv. of 11/22/50		
11/27/50	FILE RETURNED - SUGGEST CANCE. OF INDUCTION FOR DEC. 6 th AND CASE SENT TO APPEAL BOARD.		
12/6/50	board & A.A. reviewed file		

11/1/50	regadvised hearing requested		
11/17/50	12/6/50		
11/22/50	file sent to Mj. Akst. per telephone conv. of 11/22/50.		
11/27/50	FILE RETURNED - SUGGEST CANCE. OF INDUCTION FOR DEC. 6 th AND CASE SENT TO APPEAL BOARD.		
12/6/50	board & A.A. reviewed file		
12/6/50	sent to Board of Appeals		
JAN 1 1951	Appeal Board Panel No. 4 has reviewed the record and determined that the registrant is not entitled to classification in Class IV-E and is not eligible for classification in a class lower than Class IV-E and has directed that file be transmitted to the Dept. of Justice for an advisory recommendation, pursuant to Section 1626.25 (a)(4) S.S.R.		
8/13/51	ret from appeal board		
8/14/51	From - 1A - 4-0.		
8/30/51	Form m. 9/14/51.		
9/1/51	Rec'd copy of letter Reg sent to Mr. Newby		
9/6/51	Regadvised Ind. not made		
9/10/51	per letter, own work not begun - regadvised		

(P. 60)

Dates	Cont.	Minutes of Actions by Local Board and Appeal Board	Vote	
			Yes	No
	Not @ rep for sub 9/14/51.			
9/14/51	Set from 6 p.m. representing ref cover sheet			
9/14/51	Postponed until Oct 16, 1951 (at request of 4/1/51)		4	0
7/14/51	From - 10/16/51			
9/14/51	Forwarded to Col. Park - re set of 9/14/51			
10/19/51	Ref reminded to rep for sub 10/16/51			
10/25/51	HELD OVER FROM 10/16/51 END.			
10/26/51	Rec'd order to direct rep to 40 years			
11/1/51	Down for inspection			
11/6/51	as per letter conv. with Mr. Mallo given			
	has del. this date to Tracy & Quisenberry			

GOVERNMENT 7

GOVERNMENT 2A.

EXHIBIT
U. S. Dist. Court
S. D. of N. Y.
MAR 26 1952

III

If we are to examine this in light of today's problem we find that we are living in a cynical age where international morality has never sunk so low. Where men are preparing to participate in acts of violence inviting mutual disaster.

Recognizing that those among us who urge preparation of war and war itself do this on what they consider to be moral reasons. I however believe the achievements of these minor good ends does not justify wholesale and indiscriminate slaughter of human life and destruction of war.

95

GOVERNMENT'S EXHIBIT 2-B

Selective Service
Local Board No. 22
1910 Arthur Avenue,
Bronx 57, New York

August 29, 1949.

PACKER, LESTER,
50-22-29-188 Pdg. file.

Please Answer the Following Questions Where Marked With Red Pencil and Return in Stamped Envelope Enclosed:

1. Have you had prior Military Service? No.
 2. Are you a member of the National Guard or any reserve? No.
 3. Are you the sole surviving son of a family of which one or more sons or daughters were killed in action? No.
 4. Have you any dependents under 18 years of age? No.
 5. Have you any dependents over 18 years of age, wholly or partially dependent upon you for support? No. If so, give relationship? —
 6. Have you ever been convicted of crime other than minor traffic violation? No.
 7. Are you under the custody of any court at the present time? No.
 8. Single or Married? Single.
 9. Have you any physical or mental condition which in your opinion will disqualify you from service in the Armed Forces? —
- Date of Birth: 4/4/29.

Signature: (Signed) LESTER PACKER.

96

GOVERNMENT'S EXHIBIT 2-E

Oct. 20, 1950.

Dear Sirs:

After long and careful deliberation, I have reached the conclusion that I am opposed to war in all forms and therefore request that I be put in the classification 4/E and that I be sent special form 150, for conscientious objectors.

Very truly yours,

(Sgd.) LESTER PACKER,
Selective Svc. 550-22-29-188.

#

I believe that no man has
the right to take the life of
another human being regardless
of circumstance. We are put on
earth by the will of God and
by the will of God shall we depart.

OCT 31 1950

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

Selective Service No. 50 22 29 188

SELECTIVE SERVICE
LOCAL BOARD NO. 22
8910 Arthur Avenue
Bronx 57, N.Y.

(LOCAL BOARD STAMP)

Name **Packer** **Lester**
(Last) (First) (Middle)
Address **1478 Walton Avenue**
(Number and street or R. F. D. route)
Bronx, New York
(City, town, or village) (County) (State)

This form must be returned on or before **October 30, 1950**
(Five days after date of mailing or issue)

INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form No. 100).

The questions in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector; *Provided*, that the local board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service. I understand that if my claim is sustained I will be inducted into the armed forces but will be assigned to noncombatant service as defined by the President.

(Signature of registrant)

The questions in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector; *Provided*, that the local board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service. I understand that if my claim is sustained I will be inducted into the armed forces but will be assigned to noncombatant service as defined by the President.

(Signature of registrant)

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant training and service and, if my claim is sustained, I understand that I will, because of my conscientious objection to noncombatant service in the armed forces, be exempted as provided in Section 6 (j) of the Selective Service Act of 1948.

(Signature of registrant)

Series II.—RELIGIOUS TRAINING AND BELIEFS

INSTRUCTIONS.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Do you believe in a Supreme Being? Yes ☒ No ☐

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a supreme being involves duties which to you are superior to those arising from any human relation.

Answer to question 2 and 3 will be found on attached paper pages from 1-3

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

Answer on attached white sheet

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

My religious guidance is the dictates of my conscience

5. Under what circumstances, if any, do you believe in the use of force?

I am not opposed to the use of force. The use of moral force for the purpose of restraint. I do not oppose the use of certain types of physical force such as that used in institutions (mental). I am not opposed to a police force for the purpose of restraint. I am however opposed to violence, namely the organized killing of one group by another with all the profound subordination of society which such organization entails.

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

I have always tried to maintain as high a standard of moral behavior as possible. I have never been arrested for violating any laws. I have never done anyone harm to the best of my memory. I have always tried to maintain a high standard of character as can be verified by those who are acquainted with me.

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

I have never given public expression to my claims written or oral. I have never printed it.

Series III.—GENERAL BACKGROUND

INSTRUCTIONS.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (church, military, commercial, etc.).

NAME OF SCHOOL	TYPE OF SCHOOL	LOCATION OF SCHOOL	DATES ATTENDED	
			From	To
Public School 64	P.S.	170 St. + WALTON AVE	1935	1941
W.M. H. TART H.S.	H.S.	172 St. + MORRIS AVE	1944	1946
J.H.S. WADE	J.H.S.	128 St. + WALTON AVE	1947	1948
DALE CARPENTERS' INDIAN HUMAN RELATIONS	TRAINING	143 St.	1949	1949
ZION METHODIST SCHOOL	RELIGIOUS	172 St. + WALTON AVE	1948	1949

I have never done anyone harm to the best of my memory. I have always tried to maintain a high standard of character as can be verified by those who are acquainted with me.

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

I have never given public expression to my claims written or oral. I have never printed it.

Series III.—GENERAL BACKGROUND

INSTRUCTIONS.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (church, military, commercial, etc.).

NAME OF SCHOOL	TYPE OF SCHOOL	LOCATION OF SCHOOL	DATES ATTENDED	
			From	To
PUBLIC SCHOOL 64	P.S.	170 St. + WALTON AVE	1935	1941
W.M. H. TART H.S.	H.S.	172 St. + MORRIS AVE	1944	1946
J.H.S. WADE	J.H.S.	128 St. + WALTON AVE	1947	1948
DALE CARPENTERS' INDIAN HUMAN RELATIONS	TRAINING	143 St.	1949	1949
ZION METHODIST SCHOOL	RELIGIOUS	172 St. + WALTON AVE	1948	1949

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged.

TYPE OF WORK	NAME OF EMPLOYER	ADDRESS OF EMPLOYER	PERIOD WORKED	
			From	To
MILLINERY	GLADYS + BELLE INC	20 W. 37 St.	1944	1950
MERC. BUYER			19	19
			19	19
			19	19
			19	19
			19	19

3. Give all addresses and dates of residence where you have formerly lived.

NAME OF CITY, TOWN, OR VILLAGE	STATE OR FOREIGN COUNTRY	STREET ADDRESS OR R. F. D. ROUTE	DATES OF RESIDENCE	
			From—	To—
NEW YORK CITY	N.Y.	1478 WALTON AVE	1929	1950
			19	19
			19	19
			19	19
			19	19
			19	19

4. Give the name and address of your parents and indicate whether they are living or not.

Max Zucker 1478 Walton Ave Bx 52 N.Y.
 Kate Zucker " " " " " "

5 (a) State the religious denomination or sect of your father

(b) State the religious denomination or sect of your mother

Jewish
 Jewish

Series IV.—PARTICIPATION IN ORGANIZATIONS

INSTRUCTIONS.—Questions 1, 2, and 3 in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Have you ever been a member of any military organization or establishment?— If so, state the name and address of same and give reasons why you became a member.

I have never been a member of any military organization

2. Are you a member of a religious sect or organization? (a) through (e):

No
 (Yes or no)

If your answer to question 2 is "yes," answer questions

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

(b) When, where, and how did you become a member of said sect or organization?

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

2. Are you a member of a religious sect or organization? (a) through (e):

No
 (Yes or no)

If your answer to question 2 is "yes," answer questions

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

(b) When, where, and how did you become a member of said sect or organization?

(c) State the name and location of the church, congregation, or meeting where you customarily attend.

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

I have never been affiliated with any organization military political labor or otherwise

Statement to Questions #2, 3

OCT 31 1930

I do not know whether my code of morals will be considered of a religious nature although I believe in a Supreme Being. This code however may very well stem from this Supreme Being. I had received a brief religious training in my early years, such as the study of the ten commandments and religious prayer which has a definite moral significance. This training has probably had a definite bearing on my subconscious. My training also includes that given me by my parents such as moral behavior in relation to society. These moral codes to

I

to which I adhere is I believe
inherited in my nature as in
other peoples nature. It is a
part of this Super Natural force.

Perhaps my belief can best be
stated in the words of Mencius
the immortal Chinese Philosopher
when he said. Human nature is
good. If men become evil it is
not the fault of their original
endowment. The sense of mercy
is found in all men, the sense
of respect is found in all men,
the sense of shame is found
in all men, the sense of right
and wrong is found in all men.

(P. 70)

Series V.—REFERENCES

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

NAME	FULL ADDRESS	OCCUPATION OR POSITION	RELATIONSHIP TO YOU
ARTHUR MILLER	1925 HARRISON AVE	ASSN. BUYER	FRIEND

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—1. Every registrant claiming to be a conscientious objector shall make this certificate. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the person who assists him in completing this questionnaire. 3. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than \$10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Selective Service Law of 1948.)

I, Lester Packie, certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing are in my own handwriting.

(are, are not)

Registrant sign here

(Signature or mark of registrant)

(Signature of witness to mark of registrant)

(Signature of witness to mark of registrant)

If another person has assisted the registrant in completing this questionnaire, such person shall sign the following statement:

I have assisted the registrant herein named in preparation of this questionnaire because

(For example—registrant unable to read and write English, etc.)

(are, are not)

Registrant sign here

(Signature or mark of registrant)

(Signature of witness to mark of registrant)

(Signature of witness to mark of registrant)

If another person has assisted the registrant in completing this questionnaire, such person shall sign the following statement:

I have assisted the registrant herein named in preparation of this questionnaire because

(For example—registrant unable to read and write English, etc.)

(Signature of person who has assisted)

(Occupation of person who has assisted)

(Address of person who has assisted)

III

The sense of mercy is what we call benevolence or charity. The sense of shame is what we call righteousness. The sense of respect is what we call propriety. The sense of right and wrong is what we call moral consciousness.

Charity, righteousness, propriety and moral consciousness are not something that is drilled into us.

The fact is we often forget them, neglect them or ignore them. This moral consciousness is developed in different persons to varying degrees. The reason being being some people do not develop to the full extent what is in them.

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GOVERNMENT'S EXHIBIT 2-G

November 2, 1950.

Mr. LESTER PACKER, 50-22-29-188,
1478 Walton Avenue,
Bronx, New York.

Dear Sir:

After reviewing your case on November 1, 1950 the board has decided that the facts submitted does not warrant a re-opening of your classification.

Yours truly,

HELEN MIDDLEDITCH,
Clerk.

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GOVERNMENT'S EXHIBIT 2-H

Nov. 7, 1950.

Dear Sirs:

I am in receipt of your letter of Nov. 2. It has been brought to my attention that I am no longer eligible to appeal for a hearing.

Although I recognize that I do not have the legal right to a hearing due to the lapse in time since registration I do however feel I should be allowed the opportunity of a hearing in as much as I had been unaware of my right to appeal after this extended period of time. I feel that if I am allowed the opportunity to present my case personally before the hearing officer, it will enable you to have a clearer and more comprehensive picture of the entire case.

I shall also welcome a thorough investigation by the F. B. I. so that all the details may be entered into the record.

I hope the board will allow me favorable consideration in view of the fact that I had been unaware of the procedure in making an appeal.

Very Sincerely,

(Sgd.) LESTER PACKER,
Selective Ser. #50-22-29-188.

Interview Refused. RJB. 11/15/50.

November 16, 1950.

Mr. LESTER PACKER, SS No. 50-22-29-188,
1478 Walton Avenue,
Bronx, New York.

Dear Sir:

The board reviewed your case on November 15, 1950 and it was their decision that your request for an interview is denied.

Yours truly,

HELEN MIDDLEDITCH,

Clerk.

New York City Headquarters
Selective Service System
350 Fifth Avenue
New York 1, N. Y.

Refer to File

10-12-ss

November 24th, 1950.

Selective Service System

Local Board No. 22

1910 Arthur Avenue

Bronx, N. Y.

Re: Lester Packer

50-22-29-188

GENTLEMEN:

The Cover Sheet of the above named registrant is herewith returned. Examination of the facts contained therein discloses no irregularity on the part of the Local Board in its classification of the registrant. It has always been the practice of this Headquarters to permit all registrants who claim to be Conscientious Objectors to have their cases appealed to the Appeal Board, and possibly thereafter be forwarded to the United States Attorney for consideration by the Hearing Officer. This is done so that all registrants who claim to be Conscientious Objectors may be processed in the same way and be afforded all their rights, which may have lapsed or not, before any final determination is made in their case.

Even though the registrant failed to sign Series 14 of the Questionnaire referring to Conscientious Objectors, the file does disclose that the Board, during October, did supply the registrant with Special

Form for Conscientious Objector (SSS Form 150) which he completed and returned to the Local Board on October 31st, 1950. This may be considered indicative on the part of the Local Board to re-open and reconsider the registrant's claim anew. If this could be considered a reopening, then pursuant to the Regulations the registrant should have been mailed a new Notice of Classification (SSS Form No. 110) and thereafter his rights to appeal could have been extended an additional ten days.

Rather than sending out a new SSS Form No. 116 at this time, it is suggested that his Notice of Induction be cancelled and that his case be sent to the Appeal Board on the question of his objection to combatant and non-combatant duty as a Conscientious Objector. Since the records indicate that he is to Report for Induction on December 6th, it is requested that you advise this office before that date as to what action is taken by your Board.

Sincerely yours,

(Signed) CANDLER COBB,
New York City Director.

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GOVERNMENT'S EXHIBIT 2-L

December 5, 1950.

Mr. Lester Packer
1478 Walton Avenue
Bronx, New York

SS No. 50-22-29-188

DEAR SIR:

This is to advise you that your Induction schedules for December 6, 1950 has been cancelled until further notice.

Yours truly,

HELEN MIDDLEDITCH,
Clerk.

Appeal Board
Panel No. 4
350 Fifth Avenue
New York 1, N. Y.

January 16, 1951.

Honorable Irving H. [redacted]apol
United States Attorney
Southern District of New York
United States Court House
New York 7, N. Y.

Re: Lester Packer
50-22-29-188
Local Board No. 22

SIR:

Pursuant to Section 1626.25 (a) (4) of the Selective Service Regulations, we transmit herewith, for the advisory recommendation of the Department of Justice, file in the case of the above named registrant who claims that he is, by reason of religious training and belief, conscientiously opposed to participation in any form in war, and in both combatant and noncombatant training and service in the armed forces.

Appeal Board Panel No. 4 has reviewed the file and determined that the registrant is not entitled to classification in Class IV-E and is not eligible for classification in a class lower than Class IV-E.

Respectfully,

(Signed) VITO F. LANZA,
Chairman.

Enclosure

CC: Selective Service Headquarters
Local Board No. 22 (Bronx).

4/29/51

DEAR MR. DYKMAN:

I am in receipt of a notice for a hearing to be held on May 7 at 9:30 A.M.

I would appreciate your notifying me as to the nature and char-

acter of any evidence which is unfavorable and tends to defeat my claim for exemption.

Thanking you for your kind efforts
I remain

Yours truly,

(Signed) LESTER PACKER.

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GOVERNMENT'S EXHIBIT 2-Q

Department of Justice
Office of the Deputy Attorney General
Washington

July 24, 1951

Chairman, Appeal Board Panel No. 4
Selective Service System
350 Fifth Avenue
New York 1, New York

Re: Lester Packer
Selective Service No.
50-22-29-188
Local Board No. 22
Bronx, New York

DEAR SIR:

After review and examination of the entire file and record, the Department of Justice finds, as a matter of fact, that the conscientious objections of the above-named registrant are not sustained on the ground that he has failed to prove that such alleged objections are based upon deep-seated conscientious convictions arising from religious training and belief but that they are based upon philosophical or sociological grounds or upon a person moral code.

As required by Section 6(j) of the Selective Service Act of 1948, an inquiry was made in this case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Honorable Jackson A. Dykman, Hearing Officer for the Southern and Eastern Districts of New York. His report is enclosed for consideration by your Board, this Department concurring in the recommendation he has made. There is also returned the Selective Service Cover Sheet in the above case.

Accordingly, the Department of Justice recommends to your Board that the registrant be not classified as a conscientious objector.

Yours sincerely,

(Signed) PEYTON FORD,
Deputy Attorney General.

GOVERNMENT'S EXHIBIT 2-R

SELECTIVE SERVICE SYSTEM

~~Appeal Board~~~~Panel No. 4~~

205 East 42nd Street

New York 17, N. Y.

(Local Board Stamp)

August 20, 1951.

Selective Service System

Local Board No. 22

881 Gerard Avenue

Bronx 52, New York

Subject: Lester Packer

SS No. 50 22 29 188

Dear Sirs:

After consideration of the Report of Hearing, and of Hearing Officer's recommendation, in which the Department of Justice concurred, that registrant's claim as a conscientious objector be denied, Appeal Board Panel No. 4 has this day classified registrant in Class I-A, by a vote of 4-0, thereby affirming the determination of the Local Board.

Cover-sheet in this case is returned herewith.

Yours sincerely,

(Signed) VITO F. LANZA, *Chairman.*

Enclosure

cc: Selective Service Headquarters

cc: Appeal Board Panel No. 2

GOVERNMENT'S EXHIBIT 2-T

Aug. 30, 1951.

General Lewis B. Hershey,

Division of Selective Svc.

Washington, D.C.

Dear Sir:

I am in receipt of a notice of classification from my appeal board reclassifying me in 1A.

I had registered a claim with my local board for a 4E exemption as a conscientious objector. Consequently, I received a hearing with Hon. Col. A. Dykman of the Department of Justice. In rela-

tion to this hearing, there are certain unfavorable statements and recommendations made by Col. Dykman which I feel had not been entirely impartial.

Col. Dykman's report verified the fact that my parents are devout orthodox Jews, that I had received a formal religious training from the age of eight to thirteen whereupon I was confirmed. However, after a while I discontinued attendance at my church owing to the fact that I could never really go along with the ritual of my religion.

Col. Dykman states in his final analysis that I received religious training in a faith that is not opposed to military service and it is quite speculative to assume such training forms the basis of unwillingness to participate in war in all forms and that I had failed to establish, by sufficient evidence that my opposition to war arises from religious training and belief.

117 Although I acknowledge the fact that I no longer accept the ritual of my religion and that perhaps I am no longer a formal member of this sect, I most strongly accept its basic concepts. It is wrong and quite objectionable for Col. Dykman to state that this religion is not of a pacifist nature. There are many pacifists who are Jewish. One need not look far to see that a basic tenant of Judaism is the commandment Thou Shalt Not Kill. A good portion of the Old Testament deals with the pacifist gospels of the old prophets Isaiah, Jeremiah and Micah who were vehemently opposed to the use of violent means.

I feel I am being penalized most unjustly because of the training I received from this religious sect. Furthermore, if Col. Dykman questions the validity and sincerity of my belief, I might add that my particular principles of religion are a subject of accountability to my God alone.

I therefore request that you intervene in my behalf and postpone any further action that might be taken by my local board until you have restudied the entire case. I am confident that upon reviewing my case once more, I will be given the exemption I have requested.

Very truly yours,

(Signed) LESTER PACKER,

S.S. #50-22-29-188,

1478 Walton Ave.,

Bronx, N. Y.

P.S. I have a minor grievance relating to a question at the hearing. I was asked how long I have held these views and when I became aware of them. I had been misquoted. I stated "that my

118 belief had not been developed within me but was inherent
in my nature as in other people's nature and that I have
become increasingly aware of it".

Selective Service System

Local Board 22

881 Gerard Ave.

Bronx 52, N.Y.

(Written on left margin of first page)

9/5/51

Contents noted.

No comment, except that this reg't is obviously trying to beat
the draft.

Induction stands.

DLD

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GOVERNMENT'S EXHIBIT 2-U

September 6, 1951.

Mr. Lester Packer, 50-22-29-188

1478 Walton Ave.,

Bronx, N. Y.

Dear Sir:

This is to advise you that the board reviewed your letter of
August 30, 1951, and it is their decision that your classification
remain unchanged and that you are to report for Induction on
September 14, 1951 as scheduled.

Yours truly,

HELEN MIDDLEDITCH, Clerk.

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GOVERNMENT'S EXHIBIT 2-V

New York City Headquarters
SELECTIVE SERVICE SYSTEM
205 East 42nd Street
New York 17, New York

September 6, 1951.

10:kh

Mr. Lester Packer
1478 Walton Avenue
Bronx, New York

SS No. 50-22-29-188

Dear Mr. PACKER:

This will acknowledge receipt of your Special Delivery, Registered letter dated August 31, 1951, which I received this morning.

You must bear in mind that your case has been before me since last November, which means that I am entirely familiar with the progress of your classification. However, I have again today reviewed the proceedings held on your behalf.

I do not feel there is any reason for me to intervene in your case. You have had all of your procedural rights according to the Law and Regulations and your classification of 1-A was unanimously confirmed by the Appeal Board. Your order for induction will therefore stand for September 14, 1951.

Sincerely yours,

CANDLER COBB,
New York City Director.

cc: L. B. 22

National Headquarters
Selective Service System
1712 G Street, Northwest
Washington 25, D. C.

In Replying Address: The Director of Selective Service and Refer
to No. 6-70-5.

Director of Selective Service
for New York City,
11th Floor, 205 East 42nd Street,
New York 17, New York.

Subject: Lester Packer, SS No. 50-22-29-188, Local Board No. 22,
881 Gerard Avenue, Bronx 52, New York.

Dear Colonel Cobb:

It is requested that the cover sheet for the above named registrant
be forwarded to this Headquarters for review.

For the Director, LEWIS F. KOSCH,
Colonel, Artillery,
Chief, Manpower Division.

New York City Headquarters
Selective Service System
205 East 42nd Street
New York 17, N. Y.

Refer to File 10-23-11

September 10, 1951.

Mr. DAVID L. DELMAN, *Chairman*,
Local Board 22,
881 Gerard Avenue,
Bronx, New York.

Subject: Lester Packer, SS No. 50 22 29 188

Dear Mr. Delman:

This will confirm our telephone conversation requesting the above
named subject's Cover Sheet for transmittal to National Head-
quarters for review. A copy of a letter from National Headquarters
is herewith attached.

Pending the review of this registrant's Cover Sheet by National Headquarters, his induction scheduled for September 14 should be postponed.

Sincerely yours,

(Signed) CANDLER COBB,
New York City Director.

Enc.

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GOVERNMENT'S EXHIBIT 2-Y
New York City Headquarters
Selective Service System
205 East Forty-Second Street
New York 17, N. Y.

Refer to File 10:cjb

October 8, 1951.

Mr. David L. Delman,
Chairman, Local Board No. 22
881 Gerard Avenue,
Bronx 52, New York.

Re: Lester Packer, SS No. 50-22-29-188

Dear Mr. Delman:

We herewith return the cover sheet of the above-named registrant together with a copy of the letter received by us from National Headquarters and copy of a letter dated October 3rd which National Headquarters wrote to the registrant.

Sincerely yours,

(Signed) CANDLER COBB,
New York City Director.

Enc.

124 National Headquarters
Selective Service System
1712 G Street, Northwest
Washington 25, D. C.

In Replying Address: The Director of Selective Service and Refer
to No. 6-70-5

Oct. 2, 1951.

Director of Selective Service
for New York City,
11th Floor, 205 East 42nd Street,
New York 17, New York.

Subject: Lester Packer, SS No. 50-22-29-188, Local Board No. 22,
881 Gerard Avenue, Bronx 52, New York

Dear Colonel Cobb:

We are returning herewith the cover sheet of the named registrant
forwarded for our review, pursuant to our request of September 6,
1951.

After examining the cover sheet, we are of the opinion that there
is no need for further action in this case in order to prevent injustice.

For the Director, LEWIS F. KOSCH,
Colonel, Artillery, Chief
Manpower Division.

Enclosure.

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National Headquarters
Selective Service System
1712 G Street,
Washington,
D. C.
6-70-5

October 3, 1951.

Mr. Lester Packer,
1478 Walton Avenue,
Bronx, New York.

Dear Mr. Packer:

This is to acknowledge receipt of your letter of August 30, 1951.
Upon receipt of your letter, we called in your Selective Service
file and after reviewing its contents, we believe that there is no need
for further action in your case in order to prevent injustice.

For the Director, LEWIS F. KOSCH,
Colonel, Artillery, Chief
Manpower Division.

cc: Dir. of SS for N. Y. C.
Copy.

Supreme Court of the United States

No. 573, October Term, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

LESTER PACKER

Order allowing certiorari

Filed March 16, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.

FILED

JAN 9 1953

HAROLD B. WILLEY, Clerk

No. 540

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA

v.

HARRY GRAY NUENT

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEC-
OND CIRCUIT**

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Selective Service System, Monograph No. 11, "Conscientious Objection" (1950), vol. I, pp. 145, 146	16, 17
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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 540

UNITED STATES OF AMERICA

v.

HARRY GRAY NUGENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEC-
OND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit reversing respondent's conviction for refusal to submit to induction.

OPINION BELOW

The opinion of the Court of Appeals (R. 85-91) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 10, 1952 (R. 91). On December 5, 1952, Mr. Justice Jackson extended the time for

filing a petition for a writ of certiorari until January 9, 1953 (R. 97). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b) (2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Section 6(j) of the Selective Service Act of 1948 (*infra*, pp. 3-4) provides that a person whose claim for exemption from service as a conscientious objector has been rejected by his local board may appeal to an appropriate appeal board. The appeal board is to refer the claim to the Department of Justice, which, "after appropriate inquiry," is to hold a hearing and then make a recommendation to the appeal board. The appeal board considers, but is not bound to follow, that recommendation in reaching its decision. The question presented is whether a Selective Service classification is invalid because confidential F. B. I. reports are not made available to the registrant (even though he has not requested them) at or before the hearing by a Department of Justice officer in connection with the registrant's appeal from his local board's classification.

STATUTE AND REGULATIONS INVOLVED

Section 6(j) of the Selective Service Act of 1948 (62 Stat. 604, 612-613) provides:¹

¹ As amended by Section 1(q) of the Universal Military Training and Service Act of June 19, 1951 (65 Stat. 75, 86, 50 U. S. C. App., Supp. V, 456(j)); Section 6(j) of the Act of 1948 differs from the original provision quoted in the text in respects which are here immaterial. See note 2, pp. 7-8, *infra*.

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice

shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

The Selective Service Regulations, 32 C. F. R. (1949 ed.), Part 1626.25, provide:

(c) The Department of Justice shall * * * make an inquiry and hold a hearing on the character and good-faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the

armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice.

STATEMENT

On February 29, 1952, in the United States District Court for the Southern District of New York, a one-count indictment was returned against respondent charging him with a violation of Section 12 of the Selective Service Act of 1948 (62 Stat. 604, 622, 50 U. S. C. App., Supp. V, 462) by willfully failing to take the symbolic "one step forward" which would have completed his induction into the armed forces of the United States (R. 2). Subsequently, on April 21, 1952, respondent, hav-

ing waived a jury, was found guilty by the court and sentenced to imprisonment for a period of two and one-half years (R. 79).

On appeal, the Court of Appeals for the Second Circuit reversed the judgment of conviction (R. 91), holding that the induction order was not based upon a valid classification. The invalidity of the classification was held to arise from the fact that the confidential F. B. I. report of an investigation of respondent's claim to exemption as a conscientious objector had not been made available to him at or before the hearing by a Department of Justice hearing officer required by the Selective Service Act of 1948 (Section 6(j), *supra*, pp. 3-4) in connection with an appeal from an adverse classification by the local board. The court's decision rests on statutory rather than constitutional grounds, the holding being that the statute contemplates that the registrant shall have access to the investigative report prior to or at the hearing.

The events leading up to respondent's ultimate classification and attempted induction are as follows:

Respondent registered with his local board during September 1948. On February 2, 1949, he executed his classification questionnaire, indicating therein that he was "by reason of religious training and belief * * * conscientiously opposed to participation in war in any form" (R. 5, 43), and asserting further that, because of religious beliefs, he would serve only as a noncombatant (R. 5, 44). Nine months later, on October 10, 1950, the local

board received respondent's completed Selective Service System Form 150, a special form wherein conscientious objectors may set out the bases and reasons for their conscientious objection (R. 6, 46-60). In this form, respondent indicated that he was conscientiously opposed to participation in war in any form, including ~~noncombatant~~ training and service. Along with this form, respondent submitted evidence in support of his claim to exemption, including a resolution of the Bible Students General Convention, verified October 9, 1950, stating its opposition to participation in war (R. 55-56); a letter written by respondent to the local board further detailing the grounds of his conscientious objection (R. 56-58); and a resolution of the Associated Bible Students, dated November 14, 1948 (R. 59-60). On the basis of respondent's original questionnaire and the special form for conscientious objectors, together with the appended matter, the local board, on October 25, 1950, classified him 1-A, available for military service (R. 6-7). He was duly notified of this classification (R. 7).

On November 4, 1950, respondent wrote to the local board requesting a personal hearing (R. 7). The request was granted, and on February 1, 1951, a hearing was held. At the conclusion of this hearing, respondent was classified 1-A-O, a noncombatant classification for conscientious objectors (R. 8).² On February 5, 1951, notification of the new classification was mailed to respondent.

² Section 6(j) of the Selective Service Act of 1948 (*supra*,

Within ten days of the mailing of this notification, respondent notified the board that he desired to appeal from his I-A-O classification, although that was the classification he had originally sought (R. 8-9). The appeal board directed that respondent's file be transmitted to the United States Attorney for the Eastern District of New York for the purpose of securing an advisory recommendation from the Department of Justice in accordance with the requirements of the Selective Service Act and the Regulations pertaining thereto, *supra*, pp. 2-5.

The Department of Justice conducted an inquiry through the Federal Bureau of Investigation and referred the case to a Department of Justice hearing officer. Respondent was notified to appear before the hearing officer at a hearing to be held on July 26, 1951 (R. 13). With his notice, he received a set of instructions from the office of the Attorney General informing him *inter alia* of his right upon request to be advised "as to the general nature and character of any evidence * * * which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer

pp. 3-4) provided that persons claiming exemption as conscientious objectors could either be ordered to perform non-combatant military service (the type for which the present respondent was classified) or, if the objections were found to preclude such service, be deferred. As amended by the Universal Military Training and Service Act of June 19, 1951 (*supra*, note 1, p. 2), Section 6(j), no longer provides for deferment, now specifying either noncombatant service or compulsory performance of "civilian work contributing to the maintenance of the national health, safety, or interest * * *."

and refute at the hearing such unfavorable evidence" (R. 13, 77). At no time did respondent make any such request.³

At the hearing, respondent was given an opportunity again to state the grounds of his conscientious objection. He appeared for himself, and did not present any witnesses on his own behalf. The hearing officer in his report observed that the registrant's religion appeared a "free and particularly easy belief * * * calling for little effort * * *," that his references had not made a favorable impression as to his sincerity, and that the registrant had not qualified as a conscientious objector by virtue of either church affiliations, religious beliefs, or statements or affirmative actions made prior to the national emergency. In making these observations, the hearing officer made no reference to information supplied by the F.B.I. Although concluding that respondent should be classified I-A, the hearing officer acceded to the ruling of the local board and recommended a 1-A-O classification. (R. 66-67.)

The hearing officer's report, with the complete service file of respondent, was forwarded to the special assistant to the Attorney General in charge of these matters. After a review of the entire file and records, the Department of Justice on Janu-

³ At the trial, respondent testified that he had gone to the office of the hearing officer in order to ascertain whether there was anything unfavorable in the F. B. I. files, and upon being informed by the hearing officer's secretary that the files were favorable, made no further efforts to prepare for the hearing (R. 15).

ary 24, 1952, recommended to the appeal board that respondent's claim to exemption from military service should be sustained as to combatant service only (R. 68-69).

The appeal board, having before it the complete selective service file, including the hearing officer's report and the recommendation of the Department of Justice, voted on February 4, 1952, to continue respondent in class 1-A-O (R. 11). Thereafter, respondent was notified to report for induction on February 21, 1952 (R. 12). This he did, but, as indicated above, he refused to complete the induction process.

REASONS FOR GRANTING THE WRIT

In holding respondent's Selective Service classification illegal because he was not shown, at or before the Department of Justice hearing, the confidential investigative report resulting from the inquiry the Department is required to make, the decision below invalidates a procedure which has been followed in thousands of cases since 1940—a procedure which was uniformly employed during World War II under the Selective Service and Training Act of 1940, which does not appear even to have been questioned during that period, and which was known to, and evidently approved by, Congress when the relevant provisions of the 1940 Act were adopted unchanged in the Selective Service Act of 1948. Since the procedure in question applies to many thousands of cases already processed, now pending, and certain to arise as admin-

istration of the Selective Service Act continues, the issue in this case is one of great importance. Moreover, the resolution of this issue by the court below conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Imboden v. United States*, 194 F. 2d 508, certiorari denied, 343 U. S. 957, which, in holding constitutional the procedure followed in this case, implicitly sustains the view that this procedure is authorized by the Act. Because the question presented is obviously important and because we believe the court below has erred, we submit that there is need for review by this Court.

1. Under Section 5(g) of the Selective Service and Training Act of 1940 (54 Stat. 885, 889), which was identical in every material detail with the provision involved here (Section 6(j), Act of 1948, *supra*, pp. 3-4) and under which the procedure now in dispute was employed, a total of 12,388 conscientious objector cases were referred to the Department of Justice.⁴ Under the Act now in effect, a total of 4,453 cases had been referred to the Department by the end of December, 1952. In the fiscal year 1951 alone, 1990 cases were referred to the Department and 1585 were disposed of. Adhering to its long-standing policy of withholding the identity of confidential informants (cf. *United States ex rel. Touhy v. Ragen*, 340 U. S. 462); the Department of Justice has followed, under the 1948 Act, the unchallenged practice of World War II, under the 1940 Act, of supplying, upon request, a summary of the adverse information contained in

⁴ Report of the Attorney General for 1947, p. 14.

its F. B. I. reports but of refusing to turn over the reports themselves.

Strongly supporting the propriety of the procedure the Department of Justice has followed in handling the non-binding recommendation to the Selective Service appeal board required by the 1948 (as well as the 1940) Act, are the circumstances attending congressional rejection of a proposal to dispense with the Department's role under the 1948 Act. The proposal in question would have provided an appeal to a civilian commission in place of appeal within the Selective Service System supplemented by inquiry and hearing by the Department of Justice. Opposing this change, Senator Gurney, Chairman of the Committee on Armed Services, insisted that the Committee was familiar with the appeal procedure under the 1940 Act, and that this procedure had worked satisfactorily and should be continued. He said (94 Cong. Rec. 7305, 7306):

Our committee believes that the way the conscientious objectors were taken care of during the war worked out very well, generally, with the full approval of the country. The bill which is now pending follows the 1940 act, with very few technical amendments. * * *

The * * * amendment in this proposal * * * does not seem to do anything really constructive for the conscientious objectors. Heretofore, the Department of Justice has investigated appeals which the objectors make from the local boards. The amendment places the duty upon the newly created commission.

What we are after ~~really~~ are the facts, and the Department of Justice has always shown itself perfectly capable of uncovering the facts. A new commission for that purpose is not necessary.

The local selective service board, which classifies these men, would have no way in which to ascertain whether or not they were simply attempting to evade service, rather than having a bona fide conscientious objection. Therefore, striking that part of the section having to do with investigation by the Department of Justice would preclude the thorough investigation needed in these cases.

We submit that, in reenacting unchanged the pertinent provisions of the 1940 Act, Congress in effect voiced its approval of the administrative practice with which it was familiar. The inquiry and hearing by the Department of Justice continue to be a means of "uncovering the facts" in aid of the Selective Service System. The Department continues to perform only an investigative and recommending function, lacking the power of decision. Nothing in the unaltered statutory scheme justifies the novel requirement of the decision below that confidential reports prepared in the course of the Department's inquiries be disclosed to the registrant at the Department's hearing—particularly where, as here, the registrant does not even request such disclosure.⁵

2. In *Imboden v. United States*, 194 F. 2d 508.

⁵ Cf. note 3, *supra*, p. 9.

certiorari denied, 343 U. S. 957, the Court of Appeals for the Sixth Circuit rejected the contention that due process was denied by failure to disclose to a registrant the names and addresses of informants interviewed by the F. B. I. in the course of an appeal proceeding like the one involved here. Implicit in that decision is the premise, squarely contrary to the decision below in the instant case, that such a procedure is authorized by the statute. For there would otherwise have been no occasion to reach the constitutional issue.⁶

Beyond this implicit, though essential, conflict, the *Imboden* conclusion that the procedure in issue satisfies due process is plainly inconsistent with the view adopted below (R. 89-90) that, because Congress proclaimed generally that its selective service system should be "fair and just", (50 U.S.C. App., Supp. V, 451), registrants claiming exemption as conscientious objectors must be shown confidential F.B.I. reports prepared in investigating their claims. As the Court of Appeals for the Sixth Circuit observed (194 F. 2d at 513), deferment from military service is a privilege within the discretion of Congress.⁷ In enhancing this privilege by af-

⁶ Compare the observation of the court below, referring to the *Imboden* case, that (R. 90): "We are not to be understood as deciding whether, if the statute provided that such a report should not be disclosed, it would be unconstitutional." It is noteworthy in this connection that in his brief below respondent argued solely that the hearing failed to satisfy constitutional due process requirements, making no allegation of any statutory inadequacy.

⁷ "The exemption [of conscientious objectors] is viewed as a privilege." S. Rep. 1268, 80th Cong., 2d Sess., p. 14. See also, *United States v. Macintosh*, 283 U. S. 605, 624.

fording an independent, advisory review by the Department of Justice, Congress cannot be presumed to have intended invalidation of the Department's well-known policy of treating its investigative reports as confidential. Charged with the urgent task of raising an army, agencies of the Selective Service System do not act as courts. Procedural fairness, for statutory as well as constitutional purposes, varies with the nature of the problem for which the proceeding is designed. See *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 544.

Viewed in its context, we think the procedure condemned by the court below is clearly adequate. Withholding only the identities of its confidential informants, the Department of Justice supplies a registrant upon request with a summary of the evidence and contentions brought forward against him. If the charges made relate to specific occurrences which are provably false, he has opportunity to make such proof. If the adverse evidence tends to show an irreligious or non-pacific state of mind, this can be effectively overcome by the registrant's own demeanor before the hearing officer and by the testimony of persons close to him who have observed, and perhaps influenced, the intellectual development that eventuated in his conscientious objection.

3. Tested by its results, the fairness of the procedure followed by the Department of Justice is readily demonstrable. While leaving the responsibility for final determination with the Selective

Service Boards, Congress created the investigative and advisory function of the Department of Justice as a means of assuring more sympathetic treatment to conscientious objectors.⁸ And this objective has been realized. During the period ending June 30, 1946, out of 2,134 registrants claiming exemption from combatant training and service, the Department recommended that 64.6 percent be granted the claimed exemption.⁹ In 7,003 cases involving claims of conscientious objec-

⁸ As originally introduced, the Burke-Wadsworth bill, which became the Selective Service Act of 1940 (S. 4164, H. R. 10132, 76th Cong., 3d Sess.), merely provided in Section 7(d) for exemption of conscientious objectors from combatant training and service, without any special procedure for examining claims of conscientious objectors. Suggestions were offered by those concerned with the special problem of conscientious objectors for separate consideration of such claims by a civilian board, as under the British National Service Act of 1939. See testimony by representatives of the Society of Friends and of the American Civil Liberties Union, Hearings before the Senate Committee on Military Affairs on S. 4164, 76th Cong., 3d Sess., pp. 164, 309-320. The proposal for inquiry and hearing by the Department of Justice was evolved in response to these suggestions. S. Rep. No. 2002, 76th Cong., 3rd Sess., p. 9. As originally reported out of committee, the bill provided for a recommendation by the Department of Justice in all objector cases, subject to the right of either the objector or the local board to appeal to the appropriate appeal board under the Selective Service System (Section 5(d), S. Rep. No. 2002, *supra*). The House voted to eliminate the provision for reference of conscientious objector cases to the Department, and provided merely for appeal under the Selective Service System. The present procedure by which the claim is referred to the Department only when an appeal has been taken from the decision of a local board, and the recommendation is to be merely an advisory one to the appeal board, was worked out in conference. See Statement of the Managers on the part of the House, 86 Cong. Rec. 12211-12212.

⁹ Selective Service System Monograph No. 11, "Conscientious Objection" (1950), vol. I, p. 145.

tion to both combatant and noncombatant service, the Department recommended complete exemption for 49.2 percent and exemption from combatant service for 13.9 percent.¹⁰ Observing "that almost all of these registrants had their claims denied previously by one or two classification agencies of the System," a monograph of the Selective Service System records the inescapable conclusion that "the general effect of the consideration given by the Department of Justice to objector cases was to recommend that Selective Service appeal and local boards be more liberal in granting the claims of such registrants."¹¹

These concrete results refute, we think, the conclusions of Judge Hincks in *United States v. Geyer*, 108 F. Supp. 70 (D. Conn.) upon which the court below principally relied (R. 89-90). Experience has shown that independent, advisory review of a conscientious objector's claim by the Department of Justice is likely to be of real benefit, belying the view that the Department's hearing has no point except "to give the registrant opportunity to meet the contents of the [Department's F.B.I.] report" (R. 89). This view overlooks, of course, the fact that, while the registrant is not supplied with the identities of persons who have supplied the Department with information, he is entitled to a summary of any information which may be adverse to him and is afforded an opportunity at the hearing to meet and contest any such

¹⁰ *Id.*, p. 146.

¹¹ *Ibid.*

information. The mere fact that Congress provided for a "hearing," as well as an "appropriate inquiry," in defining the Department's advisory task, is no ground for concluding that this task is not fairly and adequately performed unless the Department's confidential reports are disclosed to the registrant. For the nature of a proper hearing varies with the circumstances for which it is provided; in the circumstances considered here, we think it obvious that Congress intended only that a registrant should have an opportunity to present his case before the Department of Justice to assist in formulation of the Department's independent, purely advisory recommendation. Cf. Davis, *Administrative Law* (1951), sec. 78.

Equally erroneous is the argument (R. 89), that, unless it is accompanied by the F.B.I. report, the Department's recommendation is not susceptible of intelligent evaluation by the Selective Service appeal board. As the record shows (R. 66-69), the recommendation was accompanied by a statement of its grounds, including a summary of the information in the Department's investigative report, together with the report of the Department's hearing officer.¹² These materials, we submit, amply perform the advisory function with which Congress charged the Department of Justice.

¹² Under a recent change in the Selective Service Regulations, the hearing officer's report no longer goes forward with the Department's recommendation. See 17 Fed. Reg. 5451 (June 18, 1952), amending 32 C. F. R. § 1626.25. Instead, the recommendation itself is expanded to incorporate the factual findings formerly contained in the hearing officer's report.

There is nothing in the statutory description of that function, discharged for over a decade in the manner now condemned by the court below, which requires departure from the Department's settled policy of not disclosing confidential sources of information.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WALTER J. CUMMINGS, JR.,
Solicitor General.

JANUARY 1953.

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United States Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

v.
LESTER P. KAHN

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

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CITATION

Case:

United States v. Nugent, 200 F. 2d 46, petition for certiorari pending No. 540, this Term 3, 5, 6

Statutes:

Selective Service Act of 1948:

Section 6(j) (62 Stat. 604, 612-613), as amended,
50 U.S.C. App., Supp. V, 456(j)) 2, 5

Section 12 (62 Stat. 604, 622, 50 U.S.C. App., Supp.
V, 462) 2

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 573

UNITED STATES OF AMERICA, PETITIONER

v.

LESTER PACKER

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit reversing respondent's conviction for refusing to submit to induction.

OPINION BELOW

The opinion of the Court of Appeals (R. 49-51) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered December 31, 1952 (R. 51). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 6(j) of the Selective Service Act of 1948 provides that a person whose claim for exemption from service as a conscientious objector has been rejected by his local board may appeal to an appropriate appeal board. The appeal board is to refer the claim to the Department of Justice, which, "after appropriate inquiry," is to hold a hearing and then make a recommendation to the appeal board. The appeal board considers, but is not bound to follow, that recommendation in reaching its decision. The question presented is whether a Selective Service classification is invalid because confidential F. B. I. reports are not made available to the registrant (even though he has not requested them) at or before the hearing by a Department of Justice officer in connection with the registrant's appeal from his local board's classification.

STATEMENT

On November 19, 1951, in the District Court for the Southern District of New York, a one-count indictment was filed charging respondent with violating Section 12 of the Selective Service Act of 1948 (62 Stat. 604, 622, 50 U.S.C. App., Supp. V, 462) by failing to take the "one step forward" which would have constituted his induction into the armed forces (R. 1-2). At the trial respondent, having waived a jury trial, was found guilty by the court (R. 32) and was sentenced to imprisonment for a period of four years (R. 39). On appeal, the court of appeals, on the authority of its recent

decision in *United States v. Nugent*, 200 F. 2d 46, petition for a writ of certiorari pending, No. 540, this Term, reversed the judgment of the district court because at a Department of Justice hearing on his claim to exemption as a conscientious objector respondent had not been given access to the confidential F.B.I. report which had been prepared for use by the hearing officer.

The events leading to respondent's trial and conviction are as follows:

Respondent registered with his local board during September 1948. On July 19, 1949, respondent was mailed his Selective Service Questionnaire (SSS Form 100), which was completed and returned to the board (R. 14, Gov. Ex. 2A). In executing this form, respondent failed to sign Series XIV, a portion of the form designed to give registrants an opportunity to assert their conscientious opposition to war (R. 14). On September 20, 1949, the local board classified respondent 1-A, and on October 20, 1949, he was notified of the board's action and of his rights to hearing and appeal (R. 14). Approximately one year later, on October 4, 1950, respondent was sent a certificate of acceptability, indicating that he had been found acceptable for induction into the armed services (R. 15). Thereafter, on October 20, 1950, respondent made his first request for the special form for conscientious objectors (SSS Form 150) (R. 15). This form was sent to respondent, and was completed and returned to the local board on October 31, 1950 (R. 15).

In asserting his claim to exemption as a conscientious objector, respondent stated that his religious guidance came solely from the dictates of his conscience, that he had never given public expression to his claim, either oral or written, and that he was not a member of a religious sect or any other organization. In a statement appended to the form, respondent stated that he believed in a Supreme Being but did not know whether his code of morals would be considered religious, that in his early years he had received religious training which probably affected his subconscious mind, that his belief could best be stated in the words of an "immortal Chinese philosopher" who said, "Human nature is good * * * the sense of right and wrong [moral consciousness] is found in all men," and that it was his own highly developed moral consciousness that made the slaughter and destruction of war repugnant to him. (R: 64-68.)

On November 2, 1950, the clerk of the local board notified respondent that the board, after reviewing his case, had decided that the facts submitted did not warrant a reopening of his classification (R. 15-16). On November 7, 1950, respondent made a request for a hearing (R. 16), which on November 16, 1950, was denied by the local board (R. 16). On the following day, respondent was sent an order to report for induction on December 6, 1950 (R. 16-17). Before that date, however, the New York Selective Service System Headquarters advised the local board to cancel this order so that respondent could make the appeal customarily granted to per-

sons claiming conscientious objections (R. 17-18). Accordingly, respondent's file was sent to the appeal board which, after determining that respondent was not entitled to classification as a conscientious objector, forwarded the file to the Department of Justice for inquiry and hearing pursuant to Section 6(j) of the Selective Service Act of 1948 (62 Stat. 604, 612-613, as amended, 50 U.S.C. App., Supp. V, 456 (j)) and the regulations pertaining thereto (printed in the Government's petition for certiorari in *United States v. Nugent*, No. 540; this Term, pp. 2-5) (R. 18).

Respondent, upon being notified that a hearing would be held on May 7, 1951, wrote to the hearing officer requesting notification as to the nature of any evidence "which is unfavorable and tends to defeat my claim for exemption" but did not ask to be shown the Department's F. B. I. report itself (R. 19). In reply to this request, the hearing officer informed respondent that no unfavorable information had been received other than the facts apparent from his file, i.e., that he had not claimed conscientious objection in his original questionnaire and that he had stated that he was not a member of a religious sect or organization (R. 19; Def.'s Ex. A, R. 48).

At the hearing, it was brought out that respondent had received religious training in the Hebrew faith from the age of 8 or 9 to 13, that thereafter he had discontinued attendance at religious services; that his belief in non-violence did not stem from the teachings of any particular person or book but was something that he claimed had slowly

developed within himself, stimulated perhaps by the destruction of World War II and his early religious training; that he had not originally registered as a conscientious objector because he did not know whether he could pass his physical examination and did not wish to look for trouble in advance. Respondent again was informed that there was nothing derogatory in the F.B.I. report. (Def.'s Ex. B, R. 43-46).

In his report, the hearing officer, after summarizing the facts contained in respondent's special form for conscientious objectors and those brought out in the hearing, concluded that respondent had failed to establish that his opposition to war arose from religious training and belief (Gov. Ex. 2P, R. 40-42). On July 24, 1951, the Department of Justice, in a letter to the appeal board, recommended that respondent should not be classified as a conscientious objector for the reason given by the hearing officer, namely, that his convictions did not result from religious training and belief but were based upon "philosophical * * * grounds or upon a personal moral code" (Gov. Ex. 2Q, R. 75).

Subsequently, on August 20, 1951, the Selective Service appeal board voted 4-0 to classify respondent 1-A (R. 20), and on August 24, 1951, notice of this action was sent to respondent (R. 21). On August 30, 1951, respondent was sent an order to report for induction on September 14, 1951 (R. 21). On August 30 and August 31, respectively, respondent wrote to General Hershey, Director of the Selective Service System, and to the New

York City Director of Selective Service, Colonel Cobb, asking that his case be restudied (R. 21). On September 6, 1951, the local board informed respondent that no further action would be taken pursuant to his letter of August 30, and that he should report for induction on September 14, as scheduled (R. 21). On the same date, a letter from Colonel Cobb also informed respondent that the 1-A classification would stand (R. 21). However, a letter from the Chief of the Manpower Division of Selective Service in Washington, also written on September 6, 1951, directed to Colonel Cobb, requested that respondent's cover sheet be sent to Washington for review (R. 22). As a result of this further review, induction was postponed until October 16, 1951 (R. 22). After reviewing respondent's file, national Selective Service headquarters concluded that there was "no need for further action * * * in order to prevent injustice." (*Ibid.*) On October 9, 1951, the local board wrote to respondent reminding him that he was to report for induction on October 16, 1951 (R. 23).

Respondent reported for induction on that date, but was held over until November 5, 1951, so that his physical qualifications could be checked further (R. 23). On November 5, 1951, respondent executed and signed a statement which reads: "I refuse to be inducted in the armed forces of the United States" (R. 23).

REASONS FOR GRANTING THE WRIT

Relying exclusively upon its decision in *United States v. Nugent*, 200 F. 2d 46, in which a petition

for a writ of certiorari has been filed (No. 540, this Term), the court below has held that there was no valid order of induction in this case because respondent was not shown the F. B. I. report resulting from the inquiry the Department of Justice is required to make in connection with appeals from denials by local boards of claims to conscientious objection. For the reasons stated in our petition in the *Nugent* case, to which the Court is respectfully referred, we believe that the court below has erred and that the question presented in both of these cases is in any event of such importance as to require review by this Court.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted and that this case should be considered together with *United States v. Nugent*, No. 540, this Term.

WALTER J. CUMMINGS, JR.,
Solicitor General.

JANUARY 1953.

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HAROLD E. VOSEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1952

No. 540

UNITED STATES OF AMERICA, PETITIONER,

vs.

HARRY GRAY NUGENT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

HERMAN ADLERSTEIN

HAYDEN C. COVINGTON

Counsel for Respondent

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 540

UNITED STATES OF AMERICA, PETITIONER,

vs.

HARBY GRAY NUGENT, RESPONDENT.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals [85-91]¹ is reported at 200 F. 2d 46. The trial court made no findings of fact or conclusions of law. [32, 37]

Jurisdiction

The judgment of the Court of Appeals was entered November 10, 1952. [91] An order extending the time to

¹ Figures appearing herein within brackets refer to pages of the printed Transcript of Record.

file the petition for writ of certiorari to January 9, 1953, was made. [97] The petition for writ of certiorari was filed January 8, 1953. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

Question Presented

Whether Section 6 (j) of the Selective Service Act of 1948, providing for investigation and appropriate inquiry, the Selective Service Regulations and the due process clause of the Fifth Amendment required the hearing officer of the Department of Justice, upon the hearing of respondent's claim for classification as a conscientious objector, to make available to him, at or before the hearing, the secret police report concerning his conduct as a conscientious objector, and whether the use of secret evidence without divulging it to respondent in making the recommendation against his claim to the appeal board deprives respondent of his rights guaranteed by the act, the regulations and the Constitution.

Statement

During September, 1948, respondent registered. He filed a questionnaire dated February 2, 1949. [5, 43-44] In his questionnaire he claimed conscientious objection to combatant military service. [5, 53] He stated that he would serve in the armed forces as a noncombatant conscientious objector. [5, 44] The local board failed to mail respondent the special form for conscientious objector (SSS Form No. 150) promptly but delayed the mailing of it for a period of twenty months. [6, 46-65]

Contrary to the statement appearing in the questionnaire that he would serve in the armed forces as a noncom-

batant [5, 44], respondent indicated in the conscientious objector form that he was opposed to both combatant and noncombatant service. [46-60] He explained that from the time he made his statement in the questionnaire in 1949 to the time that he filed his special form for conscientious objector in October, 1950, he had increased in his study and conviction of his religion, which made it impossible for him to serve as a noncombatant in the armed forces. [24-25, 33-37, 71-72]

On October 25, 1950, following the receipt of the special form for conscientious objector and supporting proof, the local board classified Nugent in Class I-A. [6-7] He was mailed notice of this classification. [7] On November 4, 1950, he requested a personal appearance. [7] Thereafter he had a physical examination and was found acceptable. [7] Nugent was notified to appear before the local board on February 1, 1951, for his hearing. [7-8] Following the personal appearance he was placed in Class I-A-O (non-combatant conscientious objector classification) making him liable for service in the armed forces. [8] On February 5, 1951, he was notified of this classification. [8]

Nugent appealed from this classification. [8-9] The appeal board tentatively denied his claim for classification as a full conscientious objector (IV-E) and referred the case to the Department of Justice for investigation and hearing pursuant to Section 1626.25 of the Selective Service Regulations (32 C. F. R. 1626.25). [9-10]

After the investigation by the Federal Bureau of Investigation of Nugent's claim as a conscientious objector, the case was referred to the hearing officer for a hearing. [66] The hearing officer notified Nugent to appear before him. [13] Accompanying the notice were printed instructions dated September 1, 1948. [13, 77-78] The instructions notified Nugent that the hearing officer would inform the registrant of the general nature and character of any evidence adverse to his conscientious objector claim. [77] The notice stated that the registrant could make a full pres-

entation at the hearing and bring witnesses. [78] The hearing was fixed for July 26, 1951. [21]

Pursuant to the instructions Nugent went to the office of the hearing officer and requested the adverse evidence. [42-43] The secretary of the hearing officer informed him that the "F.B.I. records are favorable" and that Nugent would have no trouble in getting his conscientious objector status. [15] When asked by the secretary if he was going to bring an advisor, he informed her that since the F.B.I. records were favorable he saw no need of it. She responded, "That is right, because I feel you should have no trouble in receiving your desired classification because of the good recommendation from the F.B.I." [15] Because of this, Nugent thought that it would be unnecessary to have anyone present to assist. [15] Because of the representation and good-faith belief, Nugent's advisor, Martin Mitchell, who would have corroborated his conscientious objector claim, did not attend the hearing. [17]

At the time fixed for the hearing Nugent appeared. [17-18] He was prevented by the hearing officer from making a full statement of his claim, being cut off and told to answer questions with yes or no. [18] At the hearing the hearing officer did not mention the F.B.I. report or any adverse statements appearing therein. [19, 92-96] The hearing officer had a stenographer present making a record. [21] The stenographic report of the hearing appears in the record. [92-96] In the report of the hearing officer made to the Department of Justice reference is made to the religious group to which Nugent belonged. The hearing officer said: "Apparently each member is entitled to his own belief. Registrant's belief seems to be a free and particularly easy belief and religion, calling for little effort and practically no sacrifice." [67] This information must have come to the attention of the hearing officer through the F.B.I. report because it was not touched upon at the hearing. [92-96] There was no proof of this in the conscientious objector form or the documents submitted. [56-65] The hearing

officer then added that Nugent's references "failed to make favorable impression, and most of them were conscientious objectors themselves". [67] This statement must have come from the F.B.I. report because none of the references appeared before the hearing officer but were interviewed by the agents of the F.B.I. [92-96]

The hearing officer refers to "impressions gleaned as to" Nugent. He added that Nugent was "apparently shiftless, lazy, somewhat of a moral weakling . . .". [67] This information also must have come to the hearing officer's attention through the F.B.I. reports because it appears neither in the minutes of the hearing [92-96] nor the papers submitted by Nugent. [46-65]

The hearing officer impeached all of the statements made by Nugent and his references because none of them were made "prior to the national emergency" and, because of this fact, found that Nugent's claims "are not founded on truth in fact". [67] Notwithstanding his belief that the registrant should be denied both the conscientious objector classification to combatant military service (I-A-O) and to noncombatant military service (IV-E) making him liable for full military service and a classification of I-A, the hearing officer recommended that Nugent be put in Class I-A-O solely because the local board had placed him in that classification. [67]

The recommendation of the Assistant Attorney General, based on the report of the hearing officer and the secret police investigative report, recommended that the registrant be placed in Class I-A-O, or that his claim "by sustained as to combatant military service only, and the registrant if inducted into the land or naval forces be assigned to noncombatant duties". [68]. The Assistant Attorney General referred specifically to the secret police report made by the F.B.I., stating that Nugent, according to the report, is "inclined to be lacking in ambition". [68-69]

The appeal board classified Nugent in Class I-A-O. [10] He was notified to report for induction. [12]. He reported

and refused to submit, for which refusal he was indicted and convicted in the district court. [5]

Argument

I.

Petitioner contends that there is a conflict between the decision in the court below and *Imboden v. United States*, 194 F. 2d 508 (C. A. 6th), certiorari denied, 343 U. S. 957. (See page 11 of the petition for writ of certiorari filed herein.) There is no conflict between the two decisions.

In the *Imboden* case, *supra*, the registrant was satisfied with the facts supplied to him by the hearing officer appearing in the F.B.I. report. He was given an opportunity to answer the adverse evidence. His only complaint was that the hearing officer refused to give him the names and addresses of the informants. The refusal in the *Imboden* case, *supra*, doubtfully may be held to be valid under *Klock Jan Fat v. White*, 253 U. S. 454, 458-459.

The complaint here is much stronger. Secret, hearsay evidence was used against Nugent by the hearing officer and the Assistant Attorney General which was not made known to him. He had no opportunity to see the secret report that aided the Department of Justice in making an unfavorable recommendation. This was star-chamber proceedings in violation of that degree of fairness required of administrative agencies under the Fifth Amendment to the United States Constitution.

Imboden (194 F. 2d 508, certiorari denied, 343 U. S. 957) is confined to the particular facts of the *Imboden* case. It did not decide the F.B.I. report could not be demanded by the registrant either before or at the hearing. The holding of the Sixth Circuit is limited to the proposition that failure to identify informants was not a violation of procedural due process. There is a vast difference between merely withholding the names of informants and the use of ad-

7
verse evidence without giving the registrant an opportunity to combat, refute or answer the secret evidence.

Denial of certiorari in the *Imboden* case (194 F. 2d 508, certiorari denied, 348 U. S. 957) does not mean that the Court approved the holding of the Sixth Circuit. (See *Sunat v. Large*, 332 U. S. 174, 181, and *Houise v. Mayo*, 324 U. S. 42, 48.) Compare the remarks of Mr. Justice Frankfurter, dissenting, in *Darr v. Burford*, 339 U. S. 200, 227. The point involved in this case was not passed on by the Sixth Circuit.

It is respectfully submitted that there is no jurisdiction because of conflict between the holdings of the Sixth Circuit in the *Imboden* case, *supra*, and the Second Circuit in this case.

II.

The Government contends that the legislative history of the act or the background of the act (Section 6 (j) of the Selective Service Act of 1948, 50 U. S. C. App. § 456 (j), 62 Stat. 604, 612, 613) indicates an intention on the part of Congress to permit the use of the secret report without divulging it to the registrant. It is contended that the passage of the 1948 act, re-enacting as it did the pertinent provisions of the 1940 act, constituted Congressional approval of this illegal practice. The re-enactment of the 1940 act did not constitute approval *sub silentio* of the police state practice in the investigation and hearing of Nugent's claim.—See *Girouard v. United States*, 328 U. S. 61, 69-70.

A reading of the discussions and reports on the bills that became the 1940 act and the 1948 act fails to reveal any discussion on the use of the F.B.I. report. Only the subject of the statutory procedure for investigation and appropriate hearing was discussed under the 1940 act. It is alluded to by Senator Gurney in his opposition to the Morse amendment to the 1948 act, which would have taken the classification of conscientious objectors entirely out of the Selective Service System and placed it with a special civilian consci-

entious objector commission. (See 94 Cong. Rec. 7305, 7306.) Section V dismisses Section 6 (j) of the 1948 act in Senate Report 1268, 80th Congress, Second Session, dated May 12, 1948, and says that the procedure for conscientious objector classification was "the same provisions as were found in subsection 5 (g) of the 1940 act".

Congress intended an "appropriate inquiry by the proper agency of the Department of Justice" and also "a hearing with respect to the character and good faith" of the conscientious objections. (86 Cong. Rec. 12038, 76th Congress, Third Session. See also pages 17-18, House Report No. 2947, 76th Congress, Third Session, September 14, 1940.) In Senate Report 2002 on Senate Bill 4164, 76th Congress, Third Session, dated October 5, 1940, it was stated that the Congress intended to be "fair both to a person holding conscientious scruples against war and to the Nation of which he is a part".—Page 9.

In excess of the constitutional or statutory authority Attorney General Robert H. Jackson, under color of Order No. 3229, authorized by R. S. 161 (5 U. S. C. 22), held that the F.B.I. report on conscientious objectors was privileged and confidential and could not be revealed to the conscientious objector.—40 Op. A. G. No. 8, 1941.

The procedure outlined by the Department of Justice for the investigation and hearing of conscientious objector claims and the policy not to disclose the F.B.I. report to the registrant at or before the hearing is not "fair and just".—50 U. S. C. App. (Supp. V) 451. See also *United States v. Geyer*, 108 F. Supp. 70 (D. Conn., October 7, 1952).

While procedural fairness varies in accordance with the nature of the problem (*United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537), it has always been held that use of secret police reports and undisclosed evidence is a violation of procedural due process.—*Chew Hay Qwong v. White*, 249 F. 869 (C.A. 9th); *United States ex rel. Eagles v. Samuels*, 329 U. S. 304; *United States v. Oller*, 107 F. Supp. 54 (D. Conn., July 28, 1952); *Joint Anti-Fascist Ref-*

udge Committee v. McGrath, 341 U. S. 123; *Bailey v. Richardson*, 182 F. 2d 46 (C. A. 3rd), 341 U. S. 918.

It is submitted, in the absence of a clear intent on the part of Congress expressly stated, due process of law requires that at or before the hearing the F.B.I. report be produced and made available to the registrant.—Cf. *Estep v. United States*, 327 U. S. 114.

The restrictive judicial review and the refusal to allow a *de novo* hearing upon judicial review of a draft board determination require that the F.B.I. report be produced at or before the hearing in the Department of Justice. If there was a trial *de novo* on judicial review, then the aggrieved registrant could protect himself against secret evidence and the withholding of facts obtained through undisclosed police reports. *Estep v. United States*, 327 U. S. 114, restricted the defense and *Cox v. United States*, 332 U. S. 442, confined judicial review to the Selective Service file. In order to prevent denial of rights the courts must be astute to demand that the administrative requirements be strictly followed by the administrative agency. Restricted review for the registrant means restricted liberty for the administrative agency.—*Ver Mehren v. Sirmeyer*, 36 F. 2d 876 (C. A. 8th); *United States v. Zieher*, 161 F. 2d 90 (C. A. 3rd) See *Davis on Administrative Law*, Section 75, pages 268, 269, 272.

It is respectfully submitted that if respondent is to get the full and fair judicial trial permitted by *Estep v. United States*, 327 U. S. 114, he must, in view of the trial's being confined to the administrative record (*Cox v. United States*, 332 U. S. 442), be afforded an opportunity to see the F.B.I. report and have it included in the draft board files.—32 C. F. R. 1623.1 (b).

III.

It is contended by petitioner that the procedure stipulated for, which appears in the notice sent to the registrant by the hearing officer, [77-78] is sufficient. It is said by the Government that the supplying of a summary of the evi-

dence, either in advance or upon the hearing, is sufficient.

Neither the regulations nor the procedure adopted by the Department of Justice confines the consideration of the hearing officer of the Department of Justice to only the adverse evidence appearing in the summary that may or may not be given to the registrant by the hearing officer. Both the hearing officer and the Attorney General have available the complete report. How is the registrant to know that the hearing officer and the Attorney General confine their report and recommendation only to the summary given to the registrant? The procedure employed in this case is typical. The respondent was informed that there was no adverse evidence in the F.B.I. report. The hearing officer and the Assistant Attorney General relied on evidence in the file not given to Nugent. Any type of procedure other than a complete surrender of the F.B.I. report and placing it in the file will never insure uniformity of treatment. As long as only the hearing officer and the Attorney General have the F.B.I. report, how are the registrant and the appeal board to know that the Department of Justice may not have relied on other evidence appearing in the report? Since it is the prerogative of the appeal board either to accept or to reject the Department of Justice recommendation, the F.B.I. report ought to be available to the registrant so that the recommendation can be tested and checked by the facts that the Department of Justice had before it.

The court below properly held that Nugent was entitled to decide for himself, by an examination of the F.B.I. report itself, whether there was any or other evidence that he should rebut. This cannot be left solely in the hands of the Department of Justice. The procedure described in the notice sent to the registrant by the hearing officer [77-78] is entirely inadequate. It leaves an open and uncontrolled field in the hands of the Department of Justice to administer the law. It is not fair, just or adequate for the registrant, the appeal board and the court not to have available the F.B.I. report to test the validity of the Department of Jus-

tice recommendations. The probing and the weighing of the recommendation of the department cannot be effectively accomplished unless and until the F.B.I. report is produced and made a part of the file.

It is suggested that because the recommendation of the Department of Justice is advisory and the appeal board can reject it, the failure to produce the F.B.I. report is harmless, inasmuch as the final classification is made by the appeal board. (See *Imboden v. United States*, 194 F. 2d 508, certiorari denied, 343 U.S. 957.) While the recommendation is only advisory, this does not make the illegal withholding of the F.B.I. report harmless. In every case where the conscientious objector claim is denied, the F.B.I. report is relied upon by the department, whose recommendation in turn is relied on by the appeal board. Since the withholding of the F.B.I. report vitiates the departmental procedure, it also would nullify the appeal board procedure.

The records of the Department of Justice and the Selective Service System show that over 90 per cent of the recommendations made by the department to the appeal boards are accepted and in most instances, where the departmental recommendation is rejected, it is because the conscientious objector claim has been recommended and the appeal board places the registrant in Class I-A. In practically every case where the conscientious objector claim is recommended against, the appeal board follows the recommendation.—See "Report of the Attorney General of the United States for the Fiscal Year Ended June 30, 1944", page 13.

It is submitted that because the recommendation is only advisory it does not validate the illegal proceedings in the Department of Justice when the appeal board accepts and follows such recommendations.

IV.

In the absence of cases where national security will be endangered the privilege granted under Order No. 3229 of the Attorney General, pursuant to 5 U. S. C. 22, must yield to the requirements of due process in order to insure a full and fair hearing. Divulgence of the F.B.I. report in the case of ordinary conscientious objectors would never affect national security.

United States ex rel. Touhy v. Ragen, 340 U. S. 462, is not in point. There the Government was not a party to the proceedings. It was an outside party, attempting to pry into Government records, that was involved.—Cf. *Reynolds v. United States*, 192 F. 2d 987 (C. A. 3), where *United States ex rel. Touhy v. Ragen*, *supra*, is distinguished.

The situation here is similar to that presented in *Bank Line v. United States*, 163 F. 2d 133 (C. A. 2nd); *United States v. Andolschek*, 142 F. 2d 503 (C. A. 2nd); *United States v. Krutewitch*, 145 F. 2d 87 (C. A. 2nd); *United States v. Cotton Valley Operators Committee*, 9 F. R. D. 719 (W. D. La. 1949), affirmed by an equally divided Court, 339 U. S. 940 (1950); *United States v. Schine Chain Theatres*, 4 F. R. D. 108 (W. D., N. Y. 1944); and *Zimmerman v. Poindexter*, 74 F. Supp. 933, 935 (D. Hawaii, 1947). In any event it is for the administrative agency rather than the Department of Justice to determine whether the report is properly withheld.—Cf. *E. I. duPont de Nemours Powder Co. v. Masland*, 244 U. S. 100.

Conclusion

While the question presented is of national importance sufficient to warrant a decision by this Court, it is so obvious that the judgment of the court below is plainly right

that, it is respectfully submitted, the petition for writ of certiorari should be denied.

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Nos. 540 and 573

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

HARRY GRAY NUGENT

UNITED STATES OF AMERICA, PETITIONER

v.

LESTER PACKER

ON WRITS OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES



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H. R. 6401 80th Cong., 2d Sess.	49
H. Rep. 2903, 76th Cong., 2d Sess., p. 5	47
H. Rep. 2937, 76th Cong., 3d Sess., p. 18	48
<i>Instructions to Registrants Whose Claims For Exemption As Conscientious Objectors Have Been Appealed, Feb- ruary 1941, amended 1942, reissued 1948</i>	25, 26
<i>Mason, Harlan Fiske Stone: In Defense of Individual Freedom 1918-1920's</i> , 51 Col. L. Rev. 147 (1951)	41
Selective Service System Monograph No. 11, <i>Conscientious Objection</i> (1950) Vol. I	31, 47
S. 2655, 80th Cong., 2d Sess.	49
S. Rep. 1268, 80th Cong., 2d Sess., p. 14	34, 49

Miscellaneous:

S. Rep. 2002, 76th Cong., 2d Sess., p. 3	47
Sibley and Jacob, <i>Conscription of Conscience</i> (1952)	43, 54
H. F. Stone, <i>The Conscientious Objector</i> , 21 Columbia University Quarterly 253 (1919) No. 4	40-41
War Department, <i>Statement Concerning the Treatment of Conscientious Objectors in the Army</i> (G.P.O. 1919)	39, 40

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 540

UNITED STATES OF AMERICA; PETITIONER

v.

HARRY GRAY NUGENT

No. 573

UNITED STATES OF AMERICA, PETITIONER

v.

LESTER PACKER

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals in *United States v. Nugent*, No. 540 (R. 57-63), is reported at 200 F. 2d 46. The opinion of the Court of Appeals

in *United States v. Packer*, No. 573 (R. 49-51) is reported at 200 F. 2d 540.

JURISDICTION

The judgment of the Court of Appeals in No. 540 was entered on November 10, 1952 (R. 63). On December 5, 1952, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari until January 9, 1953 (R. 64), and a petition was filed on that date. The judgment of the Court of Appeals in No. 573 was entered on December 31, 1952, and a petition for a writ of certiorari was filed on January 29, 1953. This Court granted the petitions in both cases on March 16, 1953 (R. 64). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b) (2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Section 6(j) of the Selective Service Act of 1948 provides that a person whose claim for exemption from service as a conscientious objector has been rejected by his local board may appeal to an appropriate appeal board. The appeal board is to refer the claim to the Department of Justice, which, "after appropriate inquiry," is to hold a hearing and then make a recommendation to the appeal board. The appeal board considers, but is not bound to follow, that recommendation in reaching its decision. The question presented is whether a Selective Service classification is invalid because confidential F. B. I. reports are not made available to the registrant (even though he

has not requested them) at or before the hearing by a Department of Justice officer in connection with the registrant's appeal from his local board's classification.

STATUTE AND REGULATIONS INVOLVED

Section 6(j) of the Selective Service Act of 1948 (62 Stat. 604, 612-613) provides:¹

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained, by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemp-

¹ As amended by Section 1(q) of the Universal Military Training and Service Act of June 19, 1951 (65 Stat. 75, 86, 50 U.S.C. App., Supp. V, 456(j)), Section 6(j) of the Act of 1948 differs from the original provision quoted in the text in respects which are here immaterial. See note 4, p. 8, *infra*.

tion from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow; the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

The Selective Service Regulations, 32 C.F.R. (1949 ed.), Part 1626.25, provide:

(c) The Department of Justice shall * * * make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice.

STATEMENT

Respondents were both convicted of violating Section 12 of the Selective Service Act of 1948 (62 Stat. 604, 622, 50 U. S. C. App., Supp. V, 452) by willfully failing to take the symbolic "one step forward" that would have completed their respective inductions into the armed forces of the United States [R. (No. 540) 55; R. (No. 573) 32].² On appeal, the Court of Appeals for the Second Circuit reversed the judgments of conviction [R. (No. 540) 57-63; R. (No. 573) 49-51], holding that the induction orders were not based upon valid classifications. In both cases, the invalidity of the classifications was predicated upon the fact that confidential F. B. I. reports of investigations of respondents' claims to exemption as conscientious objectors had not been made available to them at or before the Department of Justice hearing which is required by the Selective Service Act of 1948 (Section 6(j), *supra*, pp. 3-4) in connection with appeals from adverse classifications by the local board. In neither case had disclosure of the investigative reports been requested by the registrant before or at the hearing,³ nor was there any show-

² The indictment against respondent Nugent was returned on February 29, 1952, in the United States District Court for the Southern District of New York (R. 1-2). Respondent Packer was indicted in the same court on November 19, 1951 (R. 1-2). Respondents both waived jury trial [R. (No. 540) 2; R. (No. 573) 10].

³ Respondent Packer, at the criminal trial, moved pursuant to Rule 17(c), F. R. Crim. P., for production and inspection of the F.B.I. reports and caused a subpoena duces tecum to be served on the New York office of the F.B.I. (R. 4-5). The court denied the motion for inspection (R. 9) and granted the Government's motion to quash the subpoena (R. 10).

ing that derogatory information was developed in either investigation which contributed in any way to the ultimate classifications.

Nugent. The events leading up to respondent Nugent's classification and attempted induction are as follows:

Nugent registered with his local board during September 1948. On February 2, 1949, he executed his classification questionnaire, indicating therein that he was "by reason of religious training and belief * * * conscientiously opposed to participation in war in any form" (R. 4, 30-31), and asserting further that, because of religious beliefs, he would serve only as a noncombatant (R. 4, 31). Nine months later, on October 10, 1950, the local board received his completed Selective Service System Form 150, a special form wherein conscientious objectors may set out the basis and reasons for their conscientious objection (R. 4, 32-38). In this form, Nugent indicated that he was conscientiously opposed to participation in war in any form, including noncombatant training and service. Along with this form, he submitted evidence in support of his claim to exemption, including a resolution of the Bible Students General Convention, verified October 9, 1950, stating its opposition to participation in war (R. 38-39), a letter written to the local board further detailing the grounds of his conscientious objection (R. 39-40); and a resolution of the Associated Bible Students, dated November 14,

These rulings have no bearing on the question of the availability of the investigative reports at the administrative hearing.

1948 (R. 41-42). On the basis of his original questionnaire and the special form for conscientious objectors, together with the appended matter, the local board, on October 25, 1950, classified him I-A, available for military service (R. 4-5). He was duly notified of this classification (R. 5).

On November 4, 1950, Nugent wrote to the local board requesting a personal hearing (R. 5). The request was granted, and on February 1, 1951, a hearing was held. At the conclusion of this hearing, he was classified 1-A-O, a noncombatant classification for conscientious objectors (R. 6),⁴ and on February 5, 1951, notification of the new classification was mailed to him.

Within ten days of the mailing of this notification, Nugent notified the board that he desired to appeal from his 1-A-O classification, although that was the classification he had originally sought (R. 6). The appeal board, having determined that Nugent should not be classified 4-E, as he contends, directed that his file be transmitted to the United States Attorney for the Eastern District of New York for the purpose of securing an advisory recommendation from the Department of Justice in accordance with the requirements of the

⁴Section 6(j) of the Selective Service Act of 1948 (*supra*, pp. 3-4) provided that persons claiming exemption as conscientious objectors could either be ordered to perform noncombatant military service (the type for which the present respondent was classified) or, if the objections were found to preclude such service, be deferred. As amended by the Universal Military Training and Service Act of June 19, 1951 (*supra*, note 1, p. 3), Section 6(j) no longer provides for deferment, now specifying either noncombatant service or compulsory performance of "civilian work contributing to the maintenance of the national health, safety, or interest * * *"

Selective Service Act and the regulations issued under the Act, *supra*, pp. 3-5 (R. 7).

The Department of Justice conducted an inquiry through the Federal Bureau of Investigation and referred the case to a Department of Justice hearing officer. Respondent Nugent was notified to appear before the hearing officer at a hearing to be held on July 26, 1951 (R. 9). With his notice, he received a set of instructions from the office of the Attorney General informing him *inter alia* of his right upon request to be advised "as to the general nature and character of any evidence * * * which is unfavorable to, and tends to defeat, the claim of the registrant, such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence" (R. 9, 54). At no time did Nugent make any such request.⁵

At the hearing, he was given an opportunity again to state the grounds of his conscientious objection. He appeared for himself, and did not present any witnesses on his own behalf. The hearing officer in his report observed that the registrant's religion appeared a "free and particularly easy belief * * * calling for little effort * * *" that his references had not made a favorable impression as to his sincerity, and that the registrant had not qualified as a conscientious objector by vir-

⁵ At the trial, respondent testified that he had gone to the office of the hearing officer in order to ascertain whether there was anything unfavorable in the F.B.I. files, and upon being informed by the hearing officer's secretary that the files were favorable, made no further efforts to prepare for the hearing (R. 10-11).

tue of either church affiliations, religious beliefs, or statements or affirmative actions made prior to the national emergency. In making these observations, the hearing officer made no reference to information supplied by the F. B. I. Although concluding that Nugent should be classified 1-A, the hearing officer acceded to the ruling of the local board and recommended a 1-A-O classification. (R. 46-47.)

The hearing officer's report, with the complete service file and the F.B.I. investigatory report, was forwarded to the special assistant to the Attorney General in charge of these matters. After a review of the entire file and records, the Department of Justice on January 24, 1952, recommended to the appeal board that Nugent's claim to exemption from military service should be sustained as to combatant service only. (R. 47-48.)

The appeal board, having before it the complete selective service file, including the hearing officer's report and the recommendation of the Department of Justice, voted on February 4, 1952, to continue Nugent in class 1-A-O (R. 7-8). Thereafter, he was notified to report for induction on February 21, 1952 (R. 8). This he did, but, as indicated above, refused to complete the induction process.

Packer. The events leading to respondent Packer's trial and conviction are as follows:

Packer registered with his local board during September 1948. On July 19, 1949, he was mailed his Selective Service Questionnaire, which was completed and returned to the board (R. 14, 52,

Gov. Ex. 2A). In executing this form, Packer failed to sign Series XIV, a portion of the form designed to give registrants an opportunity to assert their conscientious opposition to war (R. 58). On September 20, 1949, the local board classified him 1-A, and on October 20, 1949, he was notified of the board's action and of his rights to hearing and appeal (R. 14). Approximately one year later, on October 4, 1950, Packer was sent a certificate of acceptability, indicating that he had been found acceptable for induction into the armed services (R. 15).

Thereafter, on October 20, 1950, more than two years after his original registration, he made his first request for the special form for conscientious objectors (SSS Form 150) (R. 15). This form was completed and returned to the local board on October 31, 1950 (R. 15).

In asserting his claim to exemption as a conscientious objector, Packer stated that his religious guidance came solely from the dictates of his conscience, that he had never given public expression to his claim, either oral or written, and that he was not a member of a religious sect or any other organization. In a statement appended to the form, he stated that he believed in a Supreme Being but did not know whether his code of morals would be considered religious, that in his early years he had received religious training which probably affected his subconscious mind, that his belief could best be stated in the words of an "immortal Chinese philosopher" who said, "Human nature is good * * *

the sense of right and wrong [moral consciousness] is found in all men, and that it was his own highly developed moral consciousness that made the slaughter and destruction of war repugnant to him. (R. 64-68.)

On November 2, 1950, the clerk of the local board notified Packer that the board, after reviewing his case, had decided that the facts submitted did not warrant a reopening of his classification (R. 15-16). On November 7, 1950, he made a request for a hearing (R. 16), which on November 16, 1950, was denied by the local board (R. 16). On the following day, he was sent an order to report for induction on December 6, 1950 (R. 16-17). Before that date, however, the New York Selective Service System Headquarters advised the local board to cancel this order so that Packer could make the appeal customarily granted to persons claiming conscientious objection (R. 17-18). Accordingly, Packer's file was sent to the appeal board which, after determining that he was not entitled to classification as a conscientious objector, forwarded the file to the Department of Justice for inquiry and hearing (R. 18).

Respondent Packer, upon being notified that a hearing would be held on May 7, 1951, wrote to the hearing officer requesting notification as to the nature of any evidence "which is unfavorable and tends to defeat my claim for exemption" but did not ask to be shown the Department's F.B.I. report itself (R. 19). In reply to this request, the hearing officer informed Packer that no unfavor-

able information had been received other than the facts apparent from his file, i.e., that he had not claimed conscientious objection in his original questionnaire and that he had stated that he was not a member of a religious sect or organization (R: 19; Def.'s Ex. A, R. 43).

At the hearing, it was brought out that Packer had received religious training in the Hebrew faith from the age of 8 or 9 to 13, but that thereafter he had discontinued attendance at religious services; that his belief in nonviolence did not stem from the teachings of any particular person or book but was something that had slowly developed within him, stimulated perhaps by the destruction of World War II and his early religious training; that he had not originally registered as a conscientious objector because he did not know whether he could pass his physical examination and did not wish to look for trouble in advance. He again was informed that there was nothing derogatory in the F.B.I. report. (Def.'s Ex. B. R. 43-46.)

In his report, the hearing officer after summarizing the facts contained in Packer's special form for conscientious objectors and those brought out in the hearing, concluded that this respondent had failed to establish that his opposition to war arose from religious training and belief (Gov. Ex. 2P, R: 40-42). On July 24, 1951, the Department of Justice, in a letter to the appeal board, recommended that Packer should not be classified as a conscientious objector for the reason given by the hearing officer, namely, that his convictions did not

result from religious training and belief but were based upon "philosophical * * * grounds or upon a personal moral code" (Gov. Ex. 2Q, R. 75).

Subsequently, on August 20, 1951, the Selective Service appeal board voted 4-0 to classify Packer 1-A (R. 20), and on August 24, 1951, notice of this action was sent to him (R. 21). On August 30, 1951, he was sent an order to report for induction on September 14, 1951 (R. 21). On August 30 and August 31, respectively, Packer wrote to General Hershey, Director of the Selective Service System, and to the New York City Director of Selective Service, Colonel Cobb, asking that his case be restudied (R. 21). On September 6, 1951, the local board informed him that no further action would be taken pursuant to his letter of August 30, and that he should report for induction on September 14, as scheduled (R. 21). On the same date, a letter from Colonel Cobb also informed him that the 1-A classification would stand (R. 21). However, a letter from the Chief of the Manpower Division of Selective Service in Washington to Colonel Cobb requested that Packer's cover sheet be sent to Washington for review (R. 22). As a result of this further review, induction was postponed until October 16, 1951 (R. 22). After reviewing the file, national Selective Service headquarters concluded that there was "no need for further action * * * in order to prevent injustice" (*ibid.*). On October 9, 1951, the local board wrote to Packer reminding him that he was to report for induction on October 16, 1951 (R. 23).

He reported for induction on that date, but was held over until November 5, 1951, so that his physical qualifications could be checked further (R. 23). On November 5, 1951, Packer executed and signed a statement which reads: "I refuse to be inducted in the armed forces of the United States" (R. 23).

SUMMARY OF ARGUMENT

Section 6(j) of the Selective Service Act of 1948 provides that a registrant whose claim for exemption from military service, as a conscientious objector has been denied by his local board may appeal to the appropriate appeal board. It further provides that the appeal board shall refer the claim to the Department of Justice which, "after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing." Section 6(j) specifically provides that "the appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

The court below has held that the respondents' claims for exemption as conscientious objectors were denied improperly in that in each case the investigatory report of the Federal Bureau of Investigation was not disclosed to the registrant at or before the hearing before the Department of Justice hearing officer or to the appeal board, to which the Department made its recommendation.

In so holding, and in holding that the registrant's right to be informed of the substance of any information in the report adverse to his claim does not satisfy the Act's requirement of a hearing, the court below has mistaken the nature and purpose of the "inquiry and hearing" which Congress intended the Department of Justice to conduct.

I

In ascertaining the kind of procedure Congress intended by requiring an inquiry and hearing into claims for exemption from military service on the ground of conscientious objections, regard should be had for the nature of the interests involved and the governmental action to be taken, the history of the problem and its treatment, the reasons for employing a particular type of procedure, and the disadvantages of alternative procedures. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 308, 317; *Federal Communications Commission v. WJR*, 337 U. S. 265, 276-277. It is significant that exemption from military service on conscientious objector ground is a privilege, not a constitutional right, and is so regarded by Congress. *United States v. Macintosh*, 283 U. S. 605. Thus, Congress was not required to provide any kind of an appeal procedure. Moreover, since the inquiry and hearing held by the Department results only in a recommendation to the Selective Service appeal board, it must be assumed that Congress did not intend to require a trial or adversary type of hearing which might be appropriate if the Department's decision were conclusive rather than ad-

visory. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 318-319. That Congress intended the Department to conduct an investigation rather than a trial is confirmed by the fact that the inquiry and hearing required by Section 6(j) is an integral part of a selective service system which is characterized by summary and informal procedures, and by the fact that Congress has continually excepted selective service functions, including those under Section 6(j), from the formal procedural requirements of the Administrative Procedure Act.

A. American experience with claims for exemption from military service of conscientious objectors really begins with World War I, when the Secretary of War appointed a board of inquiry, which included Dean (later Chief Justice). Stone and Judge Mack to determine upon the basis of personal interviews the sincerity of conscientious objector claims. The legislative history of the Selective Training and Service Act of 1940, in which the inquiry and hearing provisions first appeared, indicates only that the peace churches and others interested in the problem, were primarily concerned to obtain a consideration of conscientious objector claims by some wholly civilian authority. As the provisions for an "inquiry and hearing" by the Department of Justice were evolved, there was no suggestion that the Department was expected to follow a procedure vastly different from the methods used by the 1917 board of inquiry.

B. By the time the inquiry and hearing provi-

sions were reenacted as Section 6(j) of the 1948 Act, the Department of Justice had made recommendations on thousands of conscientious objector claims without disclosing the F.B.I. investigatory reports or the identity of informants to the registrants. While it does not appear whether Congress was aware of the details of the Department's inquiry and hearing procedure, it was well-known to conscientious objectors and to the churches and other organizations. The reenactment without change of the inquiry and hearing provisions in 1948 and 1951 can only mean that interested persons and groups and presumably Congress itself were satisfied with the procedure consistently followed by the Department in thousands of cases since 1940.

C. The purpose of the inquiry and hearing is to ascertain so far as possible whether a registrant's religious development and daily life support his claim for exemption as a conscientious objector which has already been denied by selective service authorities. Such information is largely available only from persons close to the registrant. The statements and opinions of such persons, when furnished to the hearing officer in the investigatory report, provide him with essential leads for questioning the registrant and his witnesses at the hearing. Since the registrant, at his request, is furnished with a statement of the general character of any information in the report adverse to his claim, he is enabled to protect himself against mistaken or malicious statements. Such disclosure to

the registrant, without divulging the names of informants, will rarely, if ever, be inadequate to enable him to rebut or explain such information, because the matters involved are peculiarly within his knowledge and that of persons available to him as witnesses.

On the other hand, it is undisputed that information of this kind, which can be obtained from persons close to the registrant, is in large part unavailable unless the sources of such information are assured that their identities will not be disclosed. The non-disclosure of the identity of informants in this situation is thus justified on the same grounds as this Court, in *Williams v. New York*, 337 U. S. 241, recognized as precluding the disclosure of the sources of information contained in a pre-sentence investigation report where the death penalty was involved.

Since the inquiry and hearing procedure followed by the Department provides each registrant with a full opportunity to establish the sincerity of his claim, there is no basis for concluding that Congress desires another procedure to be used which will deprive the Department of much of the information necessary to the proper evaluation of such claims.

II

While the court below did not determine whether due process of law requires disclosure to registrants of the F.B.I. investigatory report and the names of informants, it is clear that such disclosure is not required by due process.

Since exemption from military service is a privilege, Congress is free to provide a type of appeal or review procedure, if any, which it considers appropriate for determining claims for exemption. *Knauff v. Shaughnessy*, 338 U. S. 537. The fact that the inquiry and hearing by the Department of Justice under Section 6(j) results only in a recommendation to the appeal board strongly suggests that due process requirements do not apply to such a hearing so as to require disclosure of the names of informants.

In any event, the Department's hearing procedure accords registrants a full and fair opportunity to establish their claims, including an opportunity to know the general character of any information in the investigatory reports which is adverse to their claims. The further disclosure to registrants of the identity of the sources of essential information, thereby making much of such information unavailable, is not required by due process. *Williams v. New York*, 337 U.S. 241.

ARGUMENT

In the instant cases, the court below has held that reports of investigations made by the Federal Bureau of Investigation prior to the hearing held by the Department of Justice pursuant to Section 6(j) of the Selective Service Act of 1948 (*supra*, pp. 3-4) must be made available to the registrant before or at such hearing. The court specifically held that advising the registrant of "the general nature and character of any evidence * * *

unfavorable" to his claim would not suffice, and that the investigatory report, including the names of persons interviewed by the F.B.I., must be disclosed to the registrant "to put him in a position to interrogate or impeach the witnesses who gave such testimony" (R. (No. 540) 62). Under the decision below, it is immaterial whether the registrant has requested that such reports be disclosed to him or that he be advised of the general character of any adverse information contained in them, and no showing of actual prejudice to the respondents because of the non-disclosure of the reports was required.

The court below concluded, solely as a matter of statutory construction, (1) that the hearing required by Section 6(j) would be pointless unless it "was to give the registrant opportunity to meet the contents of the report"; and (2) that Section 6(j) in making the Department's recommendation advisory rather than binding upon the appeal board, thereby calls for evaluation by the appeal board of the worth of the Department's recommendation, "a task impossible of fulfillment unless the board has access to the entire record on which the recommendation is based." In addition, the court below takes the position that while the hearing is not a criminal trial, "its effects on defendant might be fully as important," and, therefore, the registrant is entitled to an opportunity not only to refute the information against him, but also to interrogate and impeach the sources of such information.

We contend that the decision below is erroneous in that it overlooks the nature of the inquiry and hearing conducted by the Department of Justice in conscientious objector cases as one step in the process of maintaining the armed forces, the historically informal procedure for determining such matters, the legislative history of Section 6(j) and identical predecessor provisions, the long-standing and widely known administrative construction of such statutory provisions as authorizing the procedure challenged here, and the repeated reenactment of these provisions without objection to such procedures.

The Procedural Background

The provision of Section 6(j) for an "inquiry" and "hearing" by the Department of Justice in appeals of registrants claiming exemption from military service as conscientious objectors, must be read as part of a broad and basic statute for manning the armed forces of the United States. The Selective Service Act of 1948, like its predecessor and successor statutes was enacted when "Congress deemed it imperative to secure a vast citizen army with the utmost expedition". *Estep v. United States*, 327 U.S. 114, 137 (concurring opinion of Mr. Justice Frankfurter). All of our selective service statutes, from 1917 down to date, have provided summary and informal administrative procedures within the selective service system to determine who shall be required to serve in the armed forces and who shall be exempted upon one

of the grounds specified by Congress. At all times, the case-to-case application of the induction requirements has been placed primarily in the hands of local boards and appeal boards composed largely of non-lawyers. These boards, operating without investigating facilities, have employed classification procedures in the nature of informal hearings or conferences with registrants, rather than formal trial type hearings. The burden of proof is always upon the registrant to establish his claim of exemption from the common obligation of military service. Formality is limited to the preservation of records sufficient to enable appeal boards to review what the local boards have done and to enable courts to ascertain whether the selective service authorities have complied with the command of Congress.

It is in this setting that Congress first provided in Section 5(g) of the Selective Training and Service Act of 1940 (54 Stat. 885, 889) that:

* * * Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a) (2). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, the hearing shall be held by the Department of Justice with respect to the character and good faith of the ob-

jections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision.

Before a conscientious objector case is referred to the Department of Justice, the registrant has presented his claim to his local board. From the local board's denial of his claim, he may appeal to an appeal board. Until 1952 and in the disposition of the present cases, such cases were not referred to the Department of Justice unless the appeal board also made a determination adverse to the registrant. At the present time, however, when a case is taken to the appeal board, the board refers it to the Department and the board makes no deter-

mination until it has received the Department's recommendation.

From the beginning, commencing with the formulation in 1941 of *Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed*, the Department of Justice interpreted Section 5(g) of the 1940 Act, which is now Section 6(j) of the 1948 Act, as providing an opportunity for a hearing officer to discuss personally with the registrant and his witnesses the claim of exemption and to appraise their sincerity, rather than a trial involving the testing of witnesses discovered in the course of the F.B.I. investigation.

The hearings have been conducted by hearing officers designated in central locations by the Attorney General. They have served without compensation except for an expense allowance for necessary travel. At the present time, there are approximately 175 such hearing officers, all of whom are lawyers of high standing before their bars and in their communities. Prior to the hearing, the hearing officer is furnished with the report of an F.B.I. investigation into "the character and good faith of the objections of the person concerned." The report will include information obtained by interviews with friends, clergymen, neighbors and others who are in a position to furnish information bearing upon the sincerity of the registrant's assertion of conscientious objections. Thereafter, the hearing officer sends to the registrant a standard form of written notice of the time and place of

the hearing. With this notice, the registrant is furnished a copy of the *Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed*, which from February 1941 to the present time have read as follows:

Pursuant to the provisions of section 5(g) of the Selective Training and Service Act of 1940 and paragraph 375, Section XXVII, Volume Three of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of the objections of each registrant whose claim for exemption from training and service under the said Act on the ground that he is conscientiously opposed to participation in war in any form has been denied (or granted) by a local board and an appeal has been taken to an appeal board.

1. In each instance, the hearing will be conducted by a duly designated "hearing officer", and the registrant will be duly notified by the hearing officer of the place and time fixed for the hearing on his claim.

2. Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the regis-

⁶ In 1942, the Instructions were amended to provide that such information would be furnished to registrants only at the hearing. Thereafter, the practice was followed of granting continuances to registrants needing time to rebut such information. The Instructions as reissued in 1948, as furnished to respondents Nugent and Packer, and as presently in force, read as set forth above.

trant as to the general nature and character of any evidence in his possession which is unfavorable to; and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence.

3. At the hearing by the hearing officer of the Department of Justice, the registrant will be permitted to make a full and complete presentation of his claim. He may bring with him to the hearing as witnesses any persons who have personal knowledge of facts concerning his religious training and belief and concerning the character and good faith of his objections to participation in war in any form.

4. The registrant may bring with him and submit at the hearing written statements of persons not present at the hearing containing facts and information within their personal knowledge concerning the registrant's religious training and belief and the character and good faith of his objections to participation in war in any form. Such statements shall be sworn to before a notary public or other person authorized to administer oaths. The registrant may also submit at the hearing any papers or documents, or certified copies thereof, tending to support his claim. If the registrant is unable to appear personally at the hearing, he may mail all such statements, documents, etc., to the hearing officer at his address given in the notice of hearing.

5. The hearing will not be in the nature of

a trial or judicial proceeding, but will be informal and non-legalistic. Registrants will not be required to adhere to the ordinary rules of evidence. It will not be necessary for the registrant to be represented at the hearing by an attorney. The registrant may bring with him a relative or friend or other adviser, who may sit with him at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions or make any argument concerning any evidence or any phase of the proceeding. The hearing will at all times be under the direction and control of a duly designated hearing officer, who may terminate the proceeding upon the violation of these instructions by the registrant or his adviser.

6. Ordinarily, no stenographic record of the oral testimony given at the hearing will be made. However, the hearing officer may, in his discretion, have such record made.

It is in the context of an informal procedure as described in the *Instructions* that the policy of the Department of Justice not to disclose the F.B.I. investigatory reports to registrants must be appraised. Neither the Department nor its hearing officers regard the proceeding as a trial or contest. The government is not represented by a prosecutor. The hearing examiner has no subpoena powers. The purpose of both the investigation and the hearing is to obtain whatever information will assist the hearing officer in evaluating the sincerity of the registrant's claim. On the one hand, the regis-

trant is encouraged to present information supporting his claim without regard to the rules of evidence. On the other hand, the report of the F.B.I. investigation makes available to the hearing officer information and opinions, both favorable and unfavorable to the registrant, from persons who are unwilling to have their names disclosed for purposes of impeachment and cross-examination. At the registrant's request, he is informed by the hearing officer of "the general nature and character of any evidence in [the hearing officer's] possession which is unfavorable to, and tends to defeat, the claim of the registrant." Since the registrant knows better than anyone else the development of his convictions and their manifestation in his daily life, and in view of his unrestricted opportunity to present his case to the hearing officer, we submit that the disclosure thus available to him constitutes a genuine and adequate protection against mistaken or malicious statements which may be made against him in the course of the F.B.I. investigation.

It is worth emphasizing, moreover, that the report of the F.B.I. investigation is not the sole and often not the most important basis for the hearing officer's decision. The demeanor of the registrant and his witnesses, coupled with the information furnished by the registrant himself, is decisive in many cases. In other cases, however, the F.B.I. report, including as it does information and opinions which would not be available if the names of

sources were disclosed, furnishes the hearing officer with crucial leads for questioning the registrant and his witnesses.

After the hearing, the hearing officer prepares findings of fact, usually in the form of a narrative statement, and a recommendation which he sends to the Department of Justice. There, the registrant's selective service file, the report of the F.B.I. investigation, and the hearing officers' recommendation are reviewed by a Special Assistant to the Attorney General who is assisted by other attorneys. After such a review, the Department's recommendation is prepared over the signature of the Special Assistant, and forwarded to the Selective Service appeal board from which the case originated. It is estimated that the Department concurs with the recommendation of the hearing officer in at least 95% of the cases.

Until June 1952, and in both of the instant cases, the Department's recommendation to the appeal board was accompanied by a copy of the hearing officer's recommendation. Under a 1952 change in the Selective Service Regulations (17 F. R. 5451, June 18, 1952), the hearing officer's report is no longer transmitted with the Department's recommendation, which has been expanded to incorporate the factual findings formerly contained in the hearing officer's report. The report of the F.B.I. investigation is not furnished to the appeal board.

Section 6(j) of the 1948 Act, like the corresponding provisions in the 1940 and 1951 Acts, specifically provides that, "The appeal board shall, in making its decision, give consideration to, but shall

not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board." While Congress has thus limited the Department of Justice to an investigatory and advisory role, and retained the power of decision within the Selective Service System, it is clear that the procedures of inquiry and hearing followed by the Department have been of great benefit to conscientious objectors. During the five and a half year period ending June 30, 1946, out of 2,134 cases of registrants appealing from denials of their claims of exemption from combatant training and service, the Department recommended that 64.6 percent be granted the claimed exemption. In 7,003 cases involving appeals from denials of claims of conscientious objection to both combatant and noncombatant service, the Department recommended complete exemption for 49.2 percent and exemption from combatant service for 13.9 percent. During that period, appeal boards followed the recommendations of the Department of Justice in more than 75% of the cases. Observing "that almost all of these registrants had their claims denied previously by one or two classification agencies of the System," a monograph of the Selective Service System records the inescapable conclusion that "the general effect of the consideration given by the Department of Justice to objector cases was to recommend that Selective Service appeal and local boards be more liberal in granting the claims of such registrants."

⁷ Selective Service System Monograph No. 11, "Conscientious Objection" (1950), Vol. I, pp. 145-147.

Section 6(j) of the Selective Service Act of 1948, in Providing for Inquiry and Hearing by the Department of Justice, Does Not Require a Trial Type of Hearing in Which Reports of F. B. I. Investigations, Including the Identity of Informants, Must Be Disclosed to the Registrant

Section 6(j) provides that when an appeal board refers a claim to the Department "The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing." On its face, the Act does not specify the nature of the inquiry and hearing to be held, and it gives no clue as to whether Congress intended that the report of the F. B. I. investigation, including the names of persons furnishing information to the F. B. I., must be disclosed to the registrant. The court below, looking only to the words of the statute, concluded that the purpose of the hearing was to enable the registrant to meet the results of the Department's inquiry, and that the report of the F. B. I. investigation must be disclosed to enable the registrant "to interrogate or impeach the witnesses who gave such testimony" and to enable the Selective Service appeal board to "evaluate the worth" of the Department's recommendation (R. 61-62, No. 540).

We contend, to the contrary, that "The answer will not be found in definitions of a hearing lifted from their setting and then applied to new condi-

tions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen. To know what they are, there must be recourse to all the aids available in the process of construction, to history and analogy and practice as well as to the dictionary." *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 317.⁸ Even where the claim has been made that a particular type of procedure was required by due process of law, this Court has upheld "the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind" and stated that the problem is "one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them." *Federal Communications Commission v. WJR*, 337 U. S. 265, 276-277. Or, as Mr. Justice Frankfurter put it, concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 163,

The Court has responded to the infinite variety and perplexity of the tasks of government by

⁸ In the same case, this Court stated that (288 U.S. at 308):

Our discussion of the significance of history as an aid to the construction of the statute will be inadequate if it is confined to the history of hearings by congressional committees and to the amendments of the bill in its progress through the Houses. There is need to consider also the history of this Commission before the Act of 1922, and that of earlier commissions organized for kindred purposes.

recognizing that what is unfair in one situation may be fair in another * * * The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

See also Davis, *Administrative Law* (1951) section 78.

Before turning to the legislative history of Section 6(j) and the history of the treatment of conscientious objectors in this country, certain legal characteristics of the inquiry and hearing conducted by the Department of Justice should be emphasized.

First, there is no constitutional right to exemption as a conscientious objector. "The privilege of the * * * conscientious objector to avoid bearing arms comes not from the constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; * * *". *United States v. Macintosh*, 283 U. S. 605, 624. The present exemption was regarded as a privilege by the framers of the 1948 Act (S. Rep. 1268, 80th Cong., 2d Sess., p. 14), and the Sixth Circuit in *Imboden v. United States*, 194 F. 2d 508, certiorari denied, 343 U. S. 957, took this

into account in holding that due process was satisfied even though the identity of informants was withheld.

Thus, Congress was free to leave claims for exemption because of conscientious objections entirely to determination under the summary and informal procedures of Selective Service local and appeal boards by which claims for exemption on other grounds are decided. *Ex Parte Stanziale*, 138 F. 2d 312, 314 (C. A. 3); *United States v. Pitt*, 144 F. 2d 169 (C. A. 3); *Petersen v. United States*, 173 F. 2d 111, 115 (C. A. 6); *Niznik v. United States*, 173 F. 2d 328, 336 (C. A. 6). It was under no constitutional compulsion to provide a formal trial type of hearing, and, particularly not for an inquiry or hearing by the Department of Justice or anyone else outside the Selective Service system. Moreover, since registrants have no constitutional right to an appeal, *District of Columbia v. Clawans*, 300 U. S. 617, 627, they clearly have no constitutional right to an appeal which includes an inquiry and hearing by the Department of Justice.

Second, Congress has not empowered the Department of Justice to decide whether a registrant's claim of exemption should be granted. Rather, the Department of Justice makes a *recommendation* which the appeal board is free to accept or reject, as the board must make an independent decision. In *Norwegian Nitrogen Products Co. v. United States*, *supra*, this Court was confronted with the claim that under the provision,

of the Tariff Act that the Tariff Commission should "give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard," the Commission acted illegally in basing its recommendation to the President that he increase a tariff partly upon data which was not disclosed to an objecting importer. In rejecting this contention the Court pointed out (288 U. S. at 318-319) that

Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditional forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. * * * It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. * * *

The "hearing" that such commissions are to give must be adapted to the consequences that are to follow, to the attack and the review to which their orders will be subject. * * *

The tokens of intention set down in this opinion have a force in combination that is denied to any one of them alone. They impel

us to the holding that within the meaning of this act the "hearing" assured to one affected by a change of duty does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination as to all that they have learned. There was no thought to revolutionize the practice of investigating bodies generally and of this one in particular. Hearings had once been optional. By the new statute they became mandatory. The form remained the same.

See also, *C. & S. Air Lines v. Waterman Steamship Corp.*, 333 U. S. 103; *McGrath v. Kristensen*, 340 U.S. 162, 167-168. Here, as in the *Norwegian Nitrogen* case, the function of the Department of Justice is to investigate and advise. Unless there is evidence of a contrary Congressional purpose, it must be assumed that Congress did not intend that a "hearing," which results only in a recommendation, must include a disclosure of investigatory reports and sources to registrants and appeal boards, by analogy to criminal trials. As we will point out, the evidence is clear that by providing for a "hearing" Congress did not intend to require a trial but rather made mandatory an investigatory type of hearing which has its roots in the methods applied to this problem during World War I.

Third, as we have pointed out above, it would be anomalous if by Section 6(j) Congress intended to inject a proceeding which might call for a full-scale trial into the context of the summary and ex-

peditious procedures which characterize every other phase of the administration of the Act.

Fourth, in Section 2(a) of the Administrative Procedure Act, Congress has exempted from all of the provisions of that Act (except Section 3) "the functions conferred by the * * * Selective Training and Service Act of 1940." Section 13 of the Selective Service Act of 1948 provides that "All functions performed under this title shall be excluded from the operation of the Administrative Procedure Act * * * except as to the requirements of section 3 of such Act."⁹ Clearly, this continuous exemption of Selective Service procedures from the Administrative Procedure Act reflects the view of Congress that the essentially adversary trial procedures of Sections 5, 7 and 8 of that Act have no place in the raising of armies.

A. The legislative background of Section 6(j) shows that Congress did not contemplate a trial but rather an informal inquiry with a right to a personal appearance before a civilian agency outside the selective service system.

1. The Background—Treatment of Conscientious Objectors During World War I.—While provision for inquiry, hearing and recommendation by the Department of Justice in conscientious objector cases was not included in the American system of selective service until the 1940 Act, its purpose and function are illuminated by the procedures

⁹ This provision was continued in the Universal Military Training and Service Act of 1951, 65 Stat. 75.

developed for the handling of conscientious objector cases during World War I, a background with which those who were responsible for formulating the later statute were undoubtedly familiar.

Section 4 of the 1917 Act, 40 Stat. 76, provided that persons found to be members of a well-recognized religious sect whose existing creed forbade its members to participate in war in any form, and whose religious convictions were against war, should be exempt from combatant service. There was, however, no exemption from all military service, and in World War I conscientious objectors fell within the authority of the armed forces "[f]rom and after the day and hour" specified by the local board for reporting to the board for military duty. United States War Department, Selective Service Regulations, § 159D, p. 138, G. P. O., 1918. While the army made special arrangements for treatment of this group, there were nevertheless about 500 court-martial convictions for refusal by conscientious objectors to obey orders, and dissatisfaction with the system was widespread.

In December, 1917, the first of three important ameliorative measures was introduced in the form of an order by the Adjutant General of the Army extending the exemption from combat service to all persons claiming scruples against participation in warfare, irrespective of church affiliations. See United States War Department, *Statement Concerning the Treatment of Conscientious Objectors in the Army* (G. P. O. 1919), p. 37. The second

significant change occurred in June, 1918, when the Adjutant General made provision for farm and industrial furloughs for conscientious objectors opposed to noncombatant service.¹⁰ At the same time, the Secretary of War created a board of inquiry consisting of a representative of the Judge Advocates Office, Déan (later Chief Justice) Stone, and Judge Mack, United States Circuit Judge. The board's function, which was to determine the sincerity of men professing objection either to combatant or to noncombatant service (*ibid.*, p. 21), had become imperative with the extension of exemption to non-peace-church members and the availability of furloughs to those opposed even to noncombatant military service.

This function was satisfactorily performed by the board. By means of personal interviews and interrogation, it examined nearly all conscientious objectors in the army, including persons theretofore convicted by courts-martial, and classified those found to be sincere for agricultural furlough or noncombatant service depending on their beliefs. Of 2294 claimants, 1978 were found to be sincere either as to combatant or noncombatant service. Clemency was recommended in 113 cases where the claimant had previously been convicted by court-martial. *Ibid.*, at pp. 24, 31. See generally, H. F. Stone, *The Conscientious Objector*,

¹⁰ An Act of Congress on March 16, 1918, had authorized the Secretary of War to grant furloughs to enlisted men without pay and allowances. 40 Stat. 450.

21 Columbia University Quarterly 253. (1919) No. 4; Mason, *Harlan Fiske Stone: In Defense of Individual Freedom, 1918-20*, 51 Col. L. R. 147 (1951).

Thus, the World War I experience taught (1) that provision for conscientious objectors, to be adequate must go beyond granting limited exemption to members of the historic peace churches, (2) that degrees of objection should be recognized, at least to the extent that some provision ought to be made for those opposed to noncombatant military service, and (3) that personal interviews and interrogation by an experienced board possessing some degree of expertise proved a fair and effective method of testing sincerity and making the difficult classifications required once the limited standards of the original act were expanded. The lessons of this experience pervade the history of the 1940 and 1948 acts.

2. *The Selective Training and Service Act of 1940.*—With only minor differences not here pertinent,¹¹ the treatment of registrants who claim conscientious objection to war is the same under the Selective Service Act of 1948 as it was under the Selective Training and Service Act of 1940, § 5

¹¹ The 1948 act, unlike its predecessor, specified that the conscientious objections must rest on belief in a Supreme Being and not on "essentially political, sociological, or philosophical views or a merely personal moral code." In addition, the 1948 act failed to provide for work of national importance under civilian direction for those persons unable to serve even as noncombatants, and instead deferred such persons. The 1951 amendments, 65 Stat. 75, modified this aspect of the 1948 Act along the lines of its predecessor.

(g), 54 Stat. 885, 889. In particular, the provisions authorizing inquiry and hearing by the Department of Justice are identical in the two statutes. The legislative history of the current provisions thus begins with the Burke-Wadsworth bill (S. 4164, H. R. 10132, 76th Cong., 3d Sess.), presented to Congress in June, 1940.

Section 7(d) of the original version was substantially equivalent to the World War I provision, and merely exempted members of well-recognized religious sects opposed to participation in war from combatant training or service. Such persons were to establish the sincerity of their belief under regulations prescribed by the President, but nothing was specified as to any appeal or hearing.¹² Numerous proposals recommending liberalization of this provision were presented before the House and Senate Military Affairs Committees in hearings held during July and August, 1940. Objection was raised to the bill's recognized peace-church qualification, to its failure to recognize degrees of objection in requiring noncombatant service of all objectors, and to the complete control over conscientious objectors vested in the military.

Dr. Howard K. Beale, appearing for the American Civil Liberties Union before the Senate committee, proposed the British National Service Act of 1939 as a model to be followed in modifying Sec-

¹² See Hearings before Senate Committee on Military Affairs on S. 4164, 76th Cong., 3d Sess., p. 3; Hearings before House Committee on Military Affairs on H.R. 10132, 76th Cong., 3d Sess., p. 3.

tion 7(d).¹³ Hearings before the Senate Committee on Military Affairs on S. 4164, 76th Cong., 3d Sess., p. 309 *et seq.* In particular, he commented upon the fact that under the British system one claiming conscientious objection could be placed in the army only "after a fair hearing before a civil tribunal * * *." *Ibid.* See also testimony of Mr. Harold Evans, *ibid.*, at p. 164. Subsequently (on July 25) before the House Committee, Dr. Beale presented a substitute for § 7(d) proposing provisional registration of conscientious objectors and the establishment in the Department of Justice of a Bureau of Conscientious Objectors under the direction of a civilian commissioner. The Bureau was to establish civilian boards of inquiry in each state which were to examine objectors as to the sincerity of their beliefs, and assign those found to be sincere to noncombatant service or to work of national importance, or grant them complete exemption. The Bureau was also to establish a National Civilian Board of Appeal. Hearings be-

¹³ The development of the conscientious objector provisions for World War II has been described as consisting largely of an effort by those concerned to obtain provisions as much like those of the British National Service Act as possible. Sibley and Jacob, *Conscription of Conscience*, p. 47 (1952). That Act, 2 and 3 Geo. 6, Ch. 81, § 5, provided that one claiming conscientious objection could upon timely application be provisionally registered on a Register of Conscientious Objectors, that subsequently he could apply to his local tribunal for conditional registration, indicating at that time the degree of his objection (that is, whether he was opposed to registration, to military service, or merely to combatant duties), and that if he felt himself aggrieved by the local board's action in his case he could appeal to a civilian appellate tribunal whose decision would be final.

fore, the House Committee on Military Affairs on H.R. 10132, 76th Cong., 3d Sess., p. 191. This proposal for separate consideration of conscientious objectors outside of the ordinary channels of Selective Service, with special appeal procedures, was not adopted. The essentials of the provision ultimately substituted for the original Section 7(d) are found in the testimony of Mr. Paul C. French, appearing before the House Committee on behalf of the Friends. Speaking of this proposal, Mr. French said (*ibid.*, at pp. 201-202):

* * * It provides, in general, for a registry of persons who claim conscientious objection to war at the time they are registered under the draft on a provisional register. * * *

*It provides that the Department of Justice would see the record of every person who registered as a conscientious objector and would then hold a hearing and inquiry * * * and then report their findings back to the local draft board, whether the person was a conscientious objector and should justly be treated as such. * * **

** * * if they found his objections were not deep conscientious convictions, then his name would be removed from the provisional register of conscientious objectors, and he would be assigned to military service.*

This proposal also provided for nonmilitary work of national importance for those opposed to noncombatant service. For this reason, and because exemption was not limited to members of the recognized peace churches, the problem of

appraising sincerity became acute, as it had been under similar circumstances in the latter phases of World War I. The italicized portion above clearly indicates that the purpose of inquiry and hearing by the Department of Justice was primarily to meet this problem. The proposal represented three gains for the representatives of conscientious objection: (1) civilian work for those opposed to noncombatant service; (2) provisional registration after the British model, thereby keeping persons claiming exemption out of military control, at least until after their sincerity had been evaluated; and (3) a corollary of this, investigation and classification by a civilian agency, rather than by the War Department.

There is no mention in the legislative history of specific rights to be accorded the registrant at the Department of Justice hearing. It is probable that this was not considered since the hearing was regarded primarily as a step in an investigatory process leading to a recommended classification, rather than as a hearing in the sense of a trial. As a stage in the investigatory process, the hearing was to supplement the inquiry conducted earlier, and on the basis of data and impressions gathered through the entire investigation, the Department was to formulate its conclusion as to sincerity. The value of personal interview and interrogation had been demonstrated by the success of the World War I board of inquiry, which as its name suggests, was more an investigating than an adjudicating body. That no fundamental or substantial

change from the late World War I situation was intended to follow from transfer of the hearing function to the Department of Justice, is confirmed by the testimony of Mr. Raymond Wilson, of the Society of Friends (*ibid.*, at pp. 209-210):

Mr. Martin. You are asking in this third section of your suggestion that the examination or investigation be conducted under civilian branches of the Government, but you are not asking for elimination of that examination?

Mr. Wilson. No, we feel that it is perfectly right and proper that a hearing should be held.

Mr. Martin. And the general principles you are advocating as principles to stand on are the same ones that were recognized during the World War—it is a question of administration of them?

Mr. Wilson. Except that the administration in the War Department in the last war was not worked out until after a year or more after we got in the war. * * *

The substitute provision, which had been worked out in conjunction with Colonel O'Kelliher of the Army-Navy Committee on Selective Service,¹⁴ be-

¹⁴ It read as follows:

Strike out section 7(d) and substitute the following:

"Nothing contained in this Act shall be construed to require any person to be subject to combat training or service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form, and is so found to be a bona fide objector as hereinafter provided: All persons claiming such conscientious objections shall be listed on a register of conscientious objectors at the time of their classification

came the working draft in both the House and Senate. *Selective Service System Monograph No. 11, Conscientious Objection*, p. 79 (1950). With some minor changes in phraseology,¹⁵ it was reported out by the Senate Committee, S. Rep. 2002, 76th Cong., 2d Sess., p. 3. On August 28, 1940, the Senate passed the provision as reported. 86 Cong. Rec. 11142.

The provision reported out by the House Committee on August 29, was identical to that adopted by the Senate. H. Rep. 2903, 76th Cong., 2d Sess., p. 5. However, on August 30, Attorney General Jackson wrote to the Chairman of the House Com-

by a local board, and persons so registered shall be at once referred to the Department of Justice for inquiry and hearing. After appropriate inquiry by the proper agency of the Department of Justice, a hearing shall be held by the Department of Justice regarding the character and good faith of the objection. The Department shall, after hearing, if the objection be sustained, recommend that the objector shall (1) be assigned to noncombatant service in such capacity as the President may designate as noncombatant, or (2) if found to be a conscientious objector opposed to participation in war in any form, that he shall be assigned to work of national importance in civilian direction, or (3) if said objection is not sustained, the local board shall be immediately notified thereof, and the name of such objector shall then be removed from the register of conscientious objectors, and such objector shall thereafter be subject to classification.

"Should such conscientious objector or the local board disagree with the findings of the Department of Justice, said local board shall immediately refer said case to the appeal board having jurisdiction for final determination."

Hearings before the House Committee, *supra*, p. 211.

¹⁵ Among the changes was a provision requiring that notice of the time and place of the hearing be given to the objector, and another requiring the board or the objector to give notice to the other of disagreement with the Department's findings prior to the appeal. Committee Print No. 6, *Selective Service System Monograph No. 11, Conscientious Objection*, pp. 81-82 (1950).

mittee on Military Affairs advising him that he did not consider the duty vested in the Department by the bill a suitable one for the Department to perform, and calling attention to the possibility of leaving the classification of conscientious objectors entirely to the local boards. Whether because of this letter or for some other reason, such an amendment was made, and in the version adopted in the House there was no provision for inquiry and hearing by the Department of Justice. 86 Cong. Rec. 11689, 11753-11754.

In conference, a compromise was evolved to provide that the Department of Justice would be consulted only in the event that the objections were not sustained by the local board. Thus, the investigatory facilities of the Department would be utilized in only the more difficult cases. The Department's recommendation was, at the same time, explicitly made purely advisory. This change re-emphasizes the fact that the Department's function was intended to be investigative-advisory, rather than adjudicative, which fact, in turn, presumably accounts for the failure to specify procedural rights (other than notice) or to confer subpoena powers on the hearing officer.¹⁶ The Conference

¹⁶ The substance of the Conference agreement is set out in H. Rep. 2937, 76th Cong., 3d Sess., p. 18: "Under the conference agreement, if the objections are not sustained by the local board in the first instance, the objector is given the right to appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board is directed forthwith to refer the matter to the Department of Justice for an inquiry and hearing. After appropriate inquiry by the proper agency of the Department of Justice, a hearing is to be held by the department with respect to the character and good faith of the

Report was agreed to by both houses on September 14, 1940, 86 Cong. Rec. 12161, 12211.

3. *The Selective Service Act of 1948.*—The procedural aspects of the 1940 conscientious objector provisions were embodied without change in Section 6(j) of the bills which eventually became the Selective Service Act of 1948. (H.R. 6401, S. 2655, 80th Cong., 2d Sess.) In its report on the bill, the Senate Committee on Armed Services stated that "[e]laborate provision is made for determining claims to exemption on this ground * * *", and remarked that "[t]he exemption is viewed as a privilege." S. Rep 1268, 80th Cong., 2d Sess., p. 14. Little else was said concerning conscientious objectors either in the committee reports or at hearings which were held in the spring of 1948.

On the floor of the Senate, however, Senator Morse introduced an amendment to S. 2655 which, if enacted, would have established a separate civilian commission for classifying and otherwise handling conscientious objectors. Inquiry and hear-

objections. If the department finds the objections to be sustained it is to recommend to the appeal board (1) that the objector, if he is inducted under the Act, be assigned to non-combatant service as defined by the President, or (2) if it is found that he is conscientiously opposed to participation in such non-combatant service, in lieu of such induction that he be assigned to work of national importance under civilian direction. In making its decision, the appeal board is to consider the record on appeal from the local board, together with the recommendations, which it is not bound to follow, by the Department of Justice. All persons whose claims for exemption under this provision because of conscientious objection are sustained are to be listed by the local board on a Register of Conscientious Objectors.

ing by the Department of Justice would have been eliminated. 94 Cong. Rec. 7278. The proposal was modeled after the British and Canadian systems, and is reminiscent of the schemes proposed and rejected in 1940. A principal justification for the amendment was that it "recognize[d] the right of conscientious objectors to a fair hearing and a determination of their claims and assignment by nonmilitary personnel." 94 Cong. Rec. 7279. Throughout his argument in support of the amendment, Senator Morse stressed the fact that under the World War II practice the controlling determinations were made by the draft boards, implying thereby that reference to the Department of Justice did not provide a true hearing.

Opposing this change, Senator Gurney, Chairman of the Committee on Armed Services, insisted that the Committee was familiar with the appeal procedure under the 1940 Act, and that this procedure had worked satisfactorily and should be continued. He said (94 Cong. Rec. 7303, 7306):

Our committee believes that the way the conscientious objectors were taken care of during the war worked out very well, generally, with the full approval of the country. The bill which is now pending follows the 1940 act, with very few technical amendments * * *

* * *

The * * * amendment in this proposal * * * does not seem to do anything really constructive for the conscientious objectors. Hereto-

fore, the Department of Justice has investigated appeals which the objectors make from the local boards. The amendment places the duty upon the newly created commission. What we are after really are the facts, and the Department of Justice has always shown itself perfectly capable of uncovering the facts. A new commission for that purpose is not necessary.

The local selective service board, which classified these men, would have no way in which to ascertain whether or not they were simply attempting to evade service, rather than having a bona fide conscientious objection. Therefore, striking that part of the section having to do with investigation by the Department of Justice would preclude the thorough investigation needed in these cases.

The amendment was rejected. 94 Cong. Rec. 7307.

While neither Senator Morse nor Senator Gurney specifically mentioned the question of disclosure of the F.B.I.'s confidential investigative reports, the defeat of the amendment is nonetheless significant. The debate brought into focus the entire question of the kind of appeal to be given to persons claiming exemption as conscientious objectors. The rejection of the amendment indicates an intent to confine appeal to the ordinary channels of Selective Service, with, as Senator Gurney characterized it, fact-finding assistance from the Department of Justice of the type which it had provided under the 1940 statute.

4. *Conclusions Suggested by the Legislative History.*—While nothing in the legislative history directly relates to the question of whether the investigative reports should be shown to the registrant, it does establish certain facts which, we think, justify the conclusion that the registrant is not entitled to examine such reports.

(a). Experience in World War I had shown that a personal interview with an applicant by experienced lawyers was in itself a great aid in determining sincerity. The provision in the 1940 Act for "hearing" in addition to "inquiry" by the Department was undoubtedly a reflection of that experience, and was designed to assure the applicant an opportunity to express his views before a person not subject to local pressures and possible local prejudices.

(b) The fact that the inquiry and hearing are together the basis for a purely advisory opinion shows that the "hearing" was regarded as essentially part of the general "inquiry." It is clear that "hearing" was not used in the sense of a formal hearing with taking of testimony before a quasi-judicial administrative body with power to decide the registrant's claim. This is reinforced by the fact that no subpoena power is conferred upon the hearing officer and the Department, and by the rejection both in 1940 and 1948 of proposals for the establishment of special appeal tribunals. As noted above, provision for the hearing seems to have been inserted primarily for the purpose of giving the registrant an opportunity by his state-

ments and demeanor to demonstrate his sincerity.

(c) At any rate, nothing in the legislative history shows or implies any Congressional intent to make available the investigative reports. Moreover, as the Court of Appeals for the Ninth Circuit stated in *Elder v. United States*, decided February 24, 1953, "the court will not assume that Congress intended these investigative reports to be made public" because "the court cannot assume that Congress was unaware of this departmental policy"—referring to Department of Justice Order No. 3229, the validity of which was upheld in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, and particularly to the provision of the Order that "under no circumstances should the name of any confidential informant be divulged."

B. The reenactment without change in 1948 and 1951 of the inquiry and hearing provision of the 1940 Act must be regarded as a ratification of the challenged procedure.

Between 1940 and the present time, the Department of Justice has made recommendations in thousands of conscientious objector cases after inquiry and hearing identical with those held in these cases. We have not discovered that those aspects of the hearing procedure condemned by the court below were ever specifically called to the attention of Congress in connection with the 1948 and 1951 enactments. However, the procedure was not a secret. The peace churches and other organizations concerned with conscientious objector problems

could not have been unaware of the procedure by which the Department formulated recommendations upon the claims of thousands of their members. Indeed, each registrant was informed of the procedure by the *Instructions* furnished to him. The practice of not disclosing the investigatory report to registrants was described and criticized as early as 1943 in Cornell, *The Conscientious Objector and the Law*, pp. 26-27. See also Sibley & Jacob, *Conscription of Conscience* (1952) pp. 72-73. Under these circumstances, the lack of complaints to Congress must represent at least acquiescence in the Department's interpretation of the Act on the part of interested individuals and groups.

Moreover, in 1944 the contention was made before the Court of Appeals for the Second Circuit that denial of access to the F.B.I.'s investigative reports invalidated the classification of one claiming exemption as a conscientious objector. *United States ex rel. Brandon v. Downer*, 139 F. 2d 761 (C.A. 2). After examining the statute and the practice followed thereunder, Judge Frank, who wrote the opinion below in *Nugent*, concluded (139 F. 2d at 765):

* * * It was * * * proper for the Department of Justice, through the F.B.I., to make an inquiry and proper that the hearing officer should consider the results of such inquiry; moreover, the Hearing Officer's report disclosed that there was nothing unfavorable in the F.B.I.'s report other than the incident as to the eye-

examination which was fully disclosed to appellant. * * *

Although the hearing officer's report in the *Downer* case was favorable to the registrant; the above-quoted language nevertheless represents a judicial recognition and approval of the prior administrative construction, under which the actual reports were withheld and only a summary of the adverse information supplied.

It is apparent that the court below has changed its mind since the *Downer* case. Meanwhile, many thousands of cases have been processed in accordance with the procedure formerly accepted, and Congress has reenacted § 5(g) of the 1940 Act without any material change. This Court has said, "It is, doubtless, a rule that when judicial construction has been given to a statute, the reenactment of the statute is generally held to be in effect a legislative adoption of that construction." *Dollar Savings Bank v. United States*, 19 Wall. 227, 237. See *Shapiro v. United States*, 335 U.S. 1, 20. Even in the absence of a prior judicial construction, "when for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is reenacted in the same words, it may be presumed that the construction is satisfactory to the legislature * * *." Mr. Justice Holmes in *Copper Queen Mining Co. v. Arizona Board*, 206 U.S. 474, 479. See also *United States v. G. Falk & Bro.*, 204 U.S. 143, 152; *Brewster v. Gage*, 280 U.S. 327, 337; *United States v. Dakota-Montana Oil Co.*, 288 U.S.

459, 466; *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 500; *Helvering v. Reynolds Co.*, 306 U.S. 110, 114-115. As note above, *supra*, pp. 50-51, when the provision here involved was reenacted in 1948, Senator Gurney, Chairman of the Senate Committee on the Armed Services, expressed strong approval of the handling of conscientious objector claims. In any event, irrespective of either prior judicial construction or legislative reenactment, this Court gives great weight to long-continued administrative construction of a statute. *Robertson v. Downing*, 127 U.S. 607; *United States v. Healey*, 160 U.S. 136; *United States v. Cerecedo Hermanos y Compania*, 209 U.S. 337.

While this doctrine should not be used to perpetuate a plainly erroneous interpretation, where, as here, the established construction is reasonable and has given rise to a settled course of conduct, it cautions against easy adoption of a novel construction. It is significant in this connection that, apart from the court below, the only courts of appeals to consider the validity of the current procedure have sustained it. Thus, in *Imboden v. United States*, 194 F. 2d 508 (C.A. 6), certiorari denied, 343 U.S. 957, where it was contended that nondisclosure of the F.B.I. reports violated constitutional due process, the court held that due process was met by merely giving a summary of the adverse information while withholding the identity of confidential informants. Implicit in this decision is a holding that the disputed practice had statutory sanction, for otherwise the constitutional question would not have been reached. In the only court of appeals

decisions since the decisions below in *Nugent* and *Packer*, the Court of Appeals for the Ninth Circuit held that the statute neither "requires [n]or contemplates the inclusion of the investigative report in the file." *Elder v. United States*, No. 13,405, decided February 24, 1953. The court, after reviewing the procedure followed in the classification of conscientious objectors, concluded: "If the agency inquiry * * * is to be productive of worthwhile results, it seems essential that frankness on the part of persons interviewed be encouraged by assurance that their identity will not be divulged; and in the absence of clear intimation to the contrary the court will not assume that Congress intended these investigative reports to be made public." The court flatly rejected the *Nugent* analysis.¹⁷ The rationale of the *Elder* decision was followed by the District Court for the Northern District of Illinois in *United States v. Hein*, No. 52CR217, decided April 2, 1953.

¹⁷ With the exception of *United States v. Christiano*, Cr. No. 8644, decided November 17, 1952, which, being a Second Circuit case, followed *Nugent*, District Court decisions likewise have not gone so far as to hold that the statute calls for disclosure of the investigative reports. In *United States v. Oller* and *United States v. Donovan*, 107 F. Supp. 54 (D. Conn.), the two defendants were acquitted because the F.B.I. reports were withheld. The defect, however, was held to be constitutional rather than statutory, and was apparently predicated upon the failure of the Department to provide adequate summaries of adverse information on the basis of which the registrants might have brought forward other witnesses to the same facts to test their accuracy. The court explicitly agreed that withholding the reports was within the Department's statutory authority. To like effect is *United States v. Bouziden*, 108 F. Supp. 395 (W.D. Okla.), in which, similarly, no adequate summary of the unfavorable information had been supplied. While holding the hearing unfair for this reason, the court took pains to emphasize that it was not "holding

C. *The challenged procedure is both fair and effective in fulfilling its purpose and in determining the issues involved.*

The court below concluded, drawing from Judge Hinck's opinion in *United States v. Geyer*, 108 F. Supp. 70 (D. Conn.) that the only purpose of the hearing required by Section 6(j) "was to give the registrant opportunity to meet the contents of the [investigative] report" and that such report must be made a part of the record so as to enable the appeal board to evaluate the Department's recommendation. (No. 540, R. 61-62). To the contrary, the hearing afforded to registrants in these and thousands of other cases is effective in that it enables the Department to make informed recommendations to the appeal boards, and in that it enables registrants every opportunity to support their claims consistent with the Department's need for information from every available source.

The entire history of the treatment of conscientious objector claims in this country points to the conclusion that the principal purpose of the inquiry and hearing provisions of Section 6(j) is to give to registrants an opportunity to demonstrate the sincerity of their claims before a wholly civilian agency which will have an opportunity for oral interrogation and observation of the bearing and demeanor of registrants. This purpose is fully ac-

that a registrant may compel a hearing officer to produce reports compiled during the Department of Justice inquiry." (*Ibid.*, at 399.)

complished by the hearings held in these and other cases.

Moreover, we submit that the procedure does enable the registrant to meet any information adverse to his claim which may be contained in the investigatory report. Each registrant receives with the notice of hearing a copy of the Instructions specifically informing him that

Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence.¹⁸

If the adverse statements relate to specific acts or events which are provably false, disclosure to the

¹⁸ The form taken by a typical summary of unfavorable information was set out by the court in the *Imboden* case, *supra*, as follows (194 F. 2d at 516):

"A woman who states that she has been an active member of the Glenford Brethren Church for fifty years, * * *, recalls no one by the name of Imboden, * * *."

"An official of the Glenford Brethren Church states * * *"

"An official of the Olivet Church of the Brethren at Five Points for many years, states * * *"

"An official of Ashland College advises * * *"

"A supervising official of the Glenford Brethren Church since 1945, advises * * *"

"A former supervising official of the Glenford Brethren Church, who has been a minister in the church for fifty years, states * * *"

registrant that such allegations have been made provides him with an opportunity for refutation or explanation. If the adverse information tends to show an irreligious state of mind, such as the violation of every tenet of the particular denomination except that relating to military service, the disclosure of the nature of such allegations will enable the registrant to overcome them by his own demeanor before the hearing officer and by the testimony of persons close to him who have observed, and perhaps influenced, the religious development that produced his conscientious objection. The net result of the procedure is that the registrant is denied only the identity of the sources of information contained in the investigatory report.

The inquiry and hearing which the Department of Justice conducts is a step in the difficult task of evaluating the sincerity of registrants claiming exemption from military service as conscientious objectors. The Department believes that it will be hindered in formulating recommendations in these cases if it must disclose to each registrant the names of persons who furnished information or expressed opinions adverse to his claim and which are contained in the F. B. I. investigatory report which is furnished to the hearing officer. Inevitably, since the issue is the sincerity of religious beliefs, the information and opinion obtained from persons close to the registrant—friends, neighbors, teachers, etc.—are an important check upon the registrant's statements and those of his selected witnesses. These are the very informants who

would be markedly inhibited unless they are assured that their identities will not be disclosed. As the Court of Appeals for the Ninth Circuit stated in *Elder v. United States, supra*:

In our opinion the disclosure thought in the *Nugent* case to be required by the terms of the Act would operate, not to further, but to defeat the objective of Congress. Its apparent purpose was to require a check of the genuineness and good faith of the registrant's claim through inquiry of persons acquainted with him, and thus to ascertain whether injustice might not have been done him by the refusal of the selective service board to recognize his alleged conscientious scruples. * * * If the agency inquiry following such referral is to be productive of worthwhile results it seems essential that frankness on the part of persons interviewed be encouraged by assurance that their identity will not be divulged; and in the absence of clear intimation in the statute to the contrary the court will not assume that Congress intended these investigative reports to be made public.

The situation involved in these cases is strikingly similar to that presented by pre-sentence investigations conducted for the purpose of determining appropriate sentences in individual cases. This Court, in *Williams v. New York*, 337 U.S. 241, held that the defendant had no right to confront or cross-examine witnesses who had given information in confidence in such an investigation. There,

as here, there was no constitutional right to a hearing, and the subject of inquiry is the character and personality of the offender. The court observed (337 U.S. at 250):

We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.

Since, as in the Williams case, the confidential pre-sentence investigation may actually mean the difference between life and death,¹⁹ it can scarcely be contended that the hearing involved here deals with interests of greater moment.

Government employment, loss of which may have most serious consequences, is, like exemption from military service on the basis of conscientious objection, a privilege rather than a right. Accordingly, dismissal therefrom on the basis of confidential information has been upheld. *Bailey v. Richardson*, 182 F. 2d 46 (C.A. D.C.), affirmed by an equally divided court, 341 U. S. 918. To Miss Bailey's contention that there could be no "evidence" as that term is understood in our jurisprudence without disclosure of the sources, the court answered that in this context it had a looser meaning, perhaps equivalent to "information." (182 F. 2d at 51.) Acknowledging that the features

¹⁹ The jury had recommended life imprisonment; after considering information revealed by the pre-sentence investigation, the court imposed the death penalty.

complained of did not meet ordinary judicial standards, the court observed (*ibid.*), "But the question is not whether she had a trial. The question is whether she should have had one." The court concluded that to protect her status as a government employee she was not entitled to a judicial-type proceeding.

Similarly, the most summary of hearings has been held adequate in cases arising under the Federal Probation Act which provided that before probation might be revoked the probationer should be taken before the court. Act of March 4, 1925, c. 521, § 2, 43 Stat. 1259, 1260. In *Escœ v. Zerbst*, 295 U.S. 490, 493, this Court said that "This does not mean that he may insist upon a trial in any strict or formal sense. * * * It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. * * *". That discretion was found to have been abused in the *Escœ* case where no hearing whatsoever had been granted. On the other hand, in *Burns v. United States*, 287 U. S. 216, the petitioner complained that he had been denied permission to produce evidence in support of his testimony and that he had not received previous notice of the charges according to the established rules of judicial procedure. The court held that the hearing, though summary, was not improper or inadequate. *Ibid.*, at p. 223. Such procedural shortcuts were permitted because probation, like federal employment and exemption

from military service, is "conferred as a privilege and cannot be demanded as a right." *Ibid.*, at 220.

We submit that considering the matter involved—the privilege of exemption from military service, the advisory nature of the Department's recommendation, the hearing procedure challenged in the instant cases accords to registrants a full opportunity to establish the sincerity of their claims of conscientious objection while making available to the hearing officer and to the Department every source of information which will aid in the correct decision of these difficult subjective issues. It is clear that Congress, in requiring inquiry and hearing by the Department of Justice in these cases, never contemplated that the Department should so disclose the results of investigation as to deprive itself of sources of information necessary for making responsible recommendations. The results of the procedure have been extremely beneficial to conscientious objectors as a class. And, after 13 years of operation, Congress has given no indication that it intended to require a different procedure.

II

Disclosure of the Investigatory Reports to Registrants and Appeal Boards Is Not Required by Due Process of Law in a Hearing Under Section 6(j) Which Results Only in an Advisory Decision With Respect to a Privilege, and in which Registrants Can Obtain the Substance of Adverse Information Contained in Such Reports.

While the decision of the court below was based solely upon its interpretation of Section 6(j), we

assume that the respondents will contend (as respondent Nugent did in the court below), that the due process clause of the Fifth Amendment requires disclosure to registrants and to appeal boards of F. B. I. investigatory reports, including the names of sources of information, on conscientious objector claims. For reasons which have already been stated under Point I, we think it is clear that respondents have no constitutional right to have such investigatory reports disclosed to them or to the Selective Service appeal boards.

Exemption from military service as a conscientious objector, or for any other reason, is a privilege granted by Congress, not a constitutional right.

United States v. Macintosh, 283 U. S. 605, 624.

Having authorized exemptions for conscientious objectors, Congress was under no constitutional compulsion to provide for registrants claiming such privilege any appeal from a local board's denial of such claims, or for a hearing by the Department of Justice in connection with such an appeal. In providing for an appeal, as it has in Section 6(j), Congress is entirely free to provide an appeal or review procedure which it considers appropriate under the circumstances. *Knauff v. Shaughnessy*, 338 U.S. 537, 542, 544.

Even if the due process clause of the Fifth Amendment is applicable to the conduct of the hearing required by Section 6(j), it would not compel the result reached by the court below. As stated above in Point I of this brief, *supra*, pp. 32-34, this Court has repeatedly recognized that the type

of hearing required by due process in a particular situation varies with the nature of the private and governmental interests involved, the reasons for employing a particular procedure, the safeguards afforded by that procedure, and the cost or loss resulting from the use of alternative procedures. The present situation is one in which the Department of Justice holds a hearing to determine whether it shall *recommend* that a registrant be granted the *privilege* of exemption from military service. From these circumstances alone it follows that due process requires much less here than in a criminal proceeding or in cases where rights are finally determined. *Norwegian Nitrogen Products Co. v. United States, supra.* In hearings under Section 6(j), the Department of Justice, from 1941 until now, has not disclosed F. B. I. investigatory reports, and particularly the names of informants, to either registrants or appeal boards, so as to obtain information from persons who are unwilling to have their identities disclosed. Registrants are in no way hindered from producing any information which they believe will establish the sincerity of their claims. They are enabled to rebut mistaken or malicious statements which may be in the investigatory report by their opportunity to be advised of the general character of material in the report which is adverse to their claims. Considering that information as to the sincerity of a registrant's claim is largely derived from those persons who are close to the registrant and is related to his religious development and daily life,

such disclosure is clearly sufficient to enable him to offer rebuttal or explanation on these matters, with which he and his witnesses are more familiar than anyone else.

While the procedure challenged below is fair to the registrant, and has been extremely beneficial to conscientious objectors as a class (*supra*, p. 31), it also makes available to the Department much information which would be unavailable if the identity of the informants must be disclosed to registrants and appeal boards. The issue involved in these cases—the sincerity of claims of conscientious objection—is highly subjective and often difficult to determine. The Department and its hearing officers need every source of information which will assist in formulating useful recommendations on such claims. Where, as in this situation, there is no element of punishment of the individual involved or of depriving him of some vested right, due process of law permits use of information the sources of which are not disclosed to him. In *Williams v. New York*, 337 U. S. 241, 247; it was recognized that “Highly relevant—if not essential—to [the sentencing judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.” Accordingly, this Court concluded “most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-

examination." 337 U. S. at 250. Similarly, the Department of Justice and its hearing officers need the fullest information as to whether a registrant's daily life is consistent with his assertion of conscientious objections. As in the case of the presentencing investigation report involved in the *Williams* case, such information will often be unavailable if the names of informants are revealed. Weighing the protection afforded registrants by the Department's hearing procedure against the necessity for obtaining such information, we submit that the due process clause, if applicable, is satisfied.

CONCLUSION

It is therefore respectfully submitted that the judgments of the court below should be reversed.

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APRIL, 1953.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

HARRY GRAY NUGENT, Defendant-Appellant

I, ALEXANDER M. BELL, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the attached exhibit was used on the argument of the above entitled case in this court.

[SEAL.]

ALEXANDER M. BELL,

Clerk.

Dated: December 9, 1952.

GOVERNMENT'S EXHIBIT 2-J

U. S. v. NUGENT

In the Matter of HARRY GRAY NUGENT, *Conscientious Objector*

Hearing held July 26, 1951—Before Hearing Officer THOMAS O'ROURKE GALLAGHER, Esq., 188 Montague Street, Brooklyn, New York.

United States Attorney for the Eastern District of New York: Honorable FRANK J. PARKER.

HARRY GRAY NUGENT appearing before Mr. Thomas O'Rourke Gallagher, Hearing Officer, being duly sworn testified as follows:

Q. What is your address?

A. 1650 Ocean Parkway, Brooklyn 23, New York.

Q. Where were you born?

A. New York City.

Q. When?

A. 1929—August 5th.

Q. Are you a minister of the gospel?

A. Well, I am not an ordained minister by men, but I believe as the Master did to spread the truth to whom I have opportunity to minister.

Q. Do you claim that the Local Draft Board qualified you wrongly?

A. Well, I couldn't accept their classification. Perhaps in their point of view they felt they classified me correctly, but I can't accept it because I couldn't swear any allegiance to the armed forces. It would be in violation to my religious beliefs to do so. And, so I believe they classified me wrongly, not deliberately but nevertheless it is wrong in my eyes.

Q. What classification do you desire?

A. Well, when I wrote to the Draft Board, I told them 4E classification—the classification which would impose no military service in any way whatsoever.

Q. Do you belong to any religious organization?

A. I associate with a religious group, the Associated Bible Students. We are an organization, we are organized in dispensing the truths that we believe in, but we do not consider ourselves a part of an organization. We believe that God does not use any organization—of course we have to organize to accomplish something, but we believe we are the temple of the Living God, we the individual, not the building or anything.

Q. By that do you mean you do not need a build-

ing ordinarily called a church or any such edifice but the human body is the temple itself?

A. Well, we believe as the Scripture says "Wherever two or three are gathered in the Lord's name, he will be there also." We haven't met in homes altogether, we meet wherever it is convenient for us. We hire at the moment—we meet in a room downstairs in a church at 104 Clark Street.

Q. What is 104 Clark Street?

A. We rent, we use the meeting room for Sundays downstairs. 104 Clark Street is the Swedenborg Church. We are not connected with that in any way except we rent space from them.

Q. Is that in connection with the Jehovah Witnesses?

A. No connection.

Q. Are your parents alive?

A. Yes, they are.

Q. Is that Mr. H. A. Nugent and Mrs. B. Nugent.

A. Yes.

Q. What is the B for?

A. Beatrice.

Q. Do you live with H. A. Nugent at 1650 Ocean Parkway?

A. Yes, I do.

Q. Is your father the superintendent of that building?

A. Yes sir.

Q. He and your mother are separated, is that correct?

A. No, they are living together.

Q. You gave the address of 535 Second Street, Anderson, Kentucky, for your mother on your special form, form SS 150. Was she separated from your father at that time? What was the condition?

A. The condition wasn't a separation but the condition was that my mother was not in good health and had gone through quite an ordeal emotionally in my father's heart attack and she went away for a rest. She went away to Kentucky; it was only a vacation—not a separation. But, she was there quite some time so I gave that address.

Q. What was their religion originally?

A. Well, my father's parents, I believe, they were of the Catholic faith originally and that my father's mother, that is, my grandmother came into our religion and then on my mother's side she was raised in the religion I believe. She and her mother and her grandfather also was a minister of my religion, the religion I embrace.

Q. What do you call your religion?

A. Well, there isn't any name—we are just Bible students that associate together.

Q. Were you baptized a Catholic?

A. No, I was not.

Q. Were you brought up as a Catholic?

A. No.

Q. Did you ever go to a Catholic—Parochial School?

A. No.

Q. Or a Catholic Church?

A. No. My father believes, he embraced the belief that I embrace long before I was born.

Q. What did your father believe?

A. He was associated with the Associated Bible Students, the same group, those of the same group before I was born.

Q. When did you first start to study the Bible at any place?

A. Well, of course I always heard——

Q. No, please answer the question.

A. When I was 16 years old.

Q. Is it a fact that the Associated Bible Students of which you say you are a member, study jointly and individually the bible and have the absolute point of view to form their own conclusions as a result of their study of the bible?

A. Yes, they have that.

Q. And you have come to the conclusion that it would be wrong to bear arms against any person?

A. Yes, I have.

Q. Last year on August 5th, you were 21 years old?

A. That is correct.

Q. Did you vote in the general election last year?

A. No, I did not vote.

Q. Did you register?

A. No, I didn't register.

Q. According to your religious beliefs, do you intend to register?

A. No, I don't intend to register?

Q. Do you intend to take part in any manner with the government we have, the form of government or the maintenance of it, in the United States of America?

A. I don't intend to take part in it inasmuch as where I feel it conflicts with the rule of God.

Q. Would you be willing to do manual labor for the benefit of the government provided that you did not have to bear arms?

A. I would be willing to do manual labor provided I didn't have to swear to any oath of allegiance to contribute to the defense of any aggressive

action of the government. I do not wish to try to uphold neither do I wish to bear down. I feel I am rather, well I feel I am rather separated as a spectator or bystander.

Q. If you were called upon to do so in an assemblage or individually, would you salute the flag of the United States?

A. I would not salute the flag of the United States—I would like to clarify my statement.

Q. No, that is all right. How far did you go in school?

A. I went to the third term in high school.

Q. What high school?

A. High school of industrial art.

Q. Did they teach English and reading and writing?

A. They did.

Q. They did?

A. We had English, reading and writing and we had our subjects in commercial art also.

Q. Do you do any manual labor around the apartment where your father is superintendent?

A. Yes, I do.

Q. What for instance?

A. Well, last week I cleaned out the inside of the oil burner, the furnace, and where I feel * * * my father's health—he has had a heart condition, and where I feel his heart in danger, I will help him.

Q. Did you ever tell any of your friends or any of your neighbors about your beliefs with reference to this religion of yours?

A. I believe it is my duty to tell my belief—

Q. Wait a minute, just answer the question.

A. Yes.

Q. Whom?

A. Mr. William Nichols at 678 East 24th Street where I lived, near my former address. Mr. Irving Levitt, 120 Commonwealth Place in the building where I live. Mr. Sam Mandelbaum, 578 Clermont Road. It is hard to enumerate them, I speak to many people.

Q. * * * Was that recently.

A. Well, I constantly speak of my religion.

Q. Are they members of your organization?

A. The gentlemen I just cited?

Q. Yes.

A. They are not.

Q. Mr. Nichols is in the Army, isn't he.

A. That is correct.

Q. I assume he is not a Conscientious Objector, is that right?

A. No, he isn't.

Q. Would you be willing to drive an ambulance in Korea if you didn't have to swear allegiance to the flag?

A. No,—yes,—no.—

Q. Yes or no please?

A. No.

Q. Would you be willing to work in the medical corps if you didn't have to swear allegiance, going in as a civilian, but in the combat area?

A. Yes or no?

Q. That is right.

A. No.

Mr. GALLAGHER: That is all. You will be notified.

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OS. 540 and 573

In the Supreme Court of the United States

October Term, 1952

UNITED STATES OF AMERICA, *Petitioner*

v.

HARRY GRAY NUGENT

UNITED STATES OF AMERICA, *Petitioner*

v.

LESTER PACKER

On Writs of Certiorari to the United States Court of Appeals
for the Second Circuit.

REPLY BRIEF FOR THE UNITED STATES

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No. 540

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REPLY BRIEF FOR THE UNITED STATES

In Point III of the respondents' brief, they contend that the judgments below should be affirmed irrespective of what conclusion this Court reaches with respect to disclosure of the confidential investigative reports. It is argued with respect to respondent Nugent that procedural irregularities other than the failure to make the F.B.I. reports available to him vitiated the proceedings as to him.

As to respondent Packer, it is contended that an erroneous rule of law was applied in concluding that his objections were not based upon religious training and belief. Finally, as to both respondents, it is contended that there was not sufficient evidence to justify the classification given in each case (Resp. br. pp. 156-181). We submit that these contentions are without merit.

Nugent. The respondent Nugent complains that he was misled by assurances given him by the hearing officer's secretary (in the hearing officer's absence) that the F.B.I. report was favorable to Nugent's claim, and that in reliance upon such assurance Nugent did not offer his minister as a witness at the hearing. Respondents state that "This turned out to be a pivotal point, because the hearing officer in his report stated that no one gave evidence that Nugent had adopted his views before the Korean situation" (Resp. br. pp. 157-158). In the first place, Nugent was not entitled to rely blindly upon any statements which may have been made by the hearing officer's secretary, at least without taking advantage of his later opportunity to obtain confirmation of such statements from the hearing officer himself. This is particularly true since Nugent was aware of his own prior inconsistent position in claiming exemption from combatant service only. In any event, there was already in the Selective Service file (NR. 42-43) a letter from Nugent's minister from which it could

be concluded that Nugent's views had progressed, as he claimed. Accordingly, it was proper for the Department of Justice, in formulating its recommendation that Nugent be exempted from combatant service only, to take in consideration, as it did, the fact that originally and with full awareness of what he was doing he had claimed exemption only from combatant service (NR. 23-24).

Nugent complained at the trial and again here that the hearing officer unduly restricted his testimony and even deleted relevant testimony from the record. (NR. 12; Br. 156). At the trial, when this objection was first raised, respondent on cross-examination was unable to give any specific instances where the alleged deletions had occurred (R. 16). Moreover, a reading of the transcript of the hearing (Govt. br., Appendix, 69-75) fails to reveal the deletion of significant portions of the testimony. The questions follow each other in a logical pattern, and the transcript read as a whole is coherent.

Nugent's complaint that the hearing officer refused to allow him to testify fully as to the development of his religious beliefs (Resp. br. p. 156) was elaborated in the district court to a complaint that the hearing officer would not hear argument consisting of quotations from the Bible (NR. 13, 16). However, Nugent's selective service file, which was before the hearing officer, already contained written statements by Nugent with copious Bib-

lical quotations (NR. 33-34; 39-40) and it is not even alleged that Nugent sought to add anything new.

Finally, Nugent asserts that the hearing officer erroneously and capriciously drew conclusions adverse to his claim from the F.B.I. investigatory report which the hearing officer's secretary allegedly had advised Nugent was favorable to his claim (Resp. br. pp. 158-163). Specifically, Nugent points to the statements in the hearing officer's report that,

"Registrant's belief seems to be a free and particularly easy belief and religion, calling for little effort and practically no sacrifice.

"As to his sincerity, the references he produced failed to make favorable impression, and most of them were conscientious objectors themselves or members of the same Bible Society.

"From the impressions gleaned as to this registrant, he is apparently shiftless, lazy, somewhat of a moral weakling—has unusual motion in walking, talking and other mannerisms which give him the appearance of being somewhat if not definitely effeminate.

"In all events, this registrant definitely has not qualified as a Conscientious Objector as to church affiliations, religious beliefs, or any statements or affirmative actions which were attested to by anyone on his behalf, made

prior to the national emergency, and it is believed that his present claims are not founded on truth in fact," (NR. 46-47)

However, the presence of irrelevant or erroneous conclusions in the hearing officer's report and recommendation cannot invalidate Nugent's classification because they were not accepted by the Department of Justice as the basis for its recommendation. The Department's recommendation, unlike the hearing examiner's report, accurately reflects the substance of the investigatory report that Nugent is sincerely interested in his religion. Thus, the Department's recommendation to the Selective Service appeal board concludes that (NR. 48):

The investigative report shows that the registrant is a religious person and attends church regularly. There is some indication in the report that the registrant is inclined to be lacking in ambition, however, his employment record is satisfactory. A number of persons interviewed, not members of the sect to which the registrant belongs, indicated that the registrant is a courteous, quiet, sober individual, who is sincerely interested in his religion. Registrant's claim for exemption from noncombatant service is not sustained because he failed to establish that because of his religious training and belief he is conscientiously op-

posed to participation in training and service in a noncombatant capacity. In this connection, attention is also invited to the registrant's statement regarding his classification, which appears on his SSS Form No. 100.

It is the Department's recommendation, not the hearing officer's report, which Section 6(j) of the Act requires the appeal board to consider. Irrelevant or erroneous conclusions in the hearing officer's report cannot invalidate a classification based upon the Department's recommendation, any more than erroneous findings of a hearing examiner employed by an administrative agency can invalidate an order which the agency issues after rejecting the findings of its examiner. Here, the Department's recommendation is supported by the substantial affirmative fact, quite apart from Nugent's burden of proof, that he first claimed exemption from combatant service only, which has been granted. Thus, the recommendation is supported by evidence within the rule of *Cox v. United States*, 332 U.S. 442, and *Estep v. United States*, 327 U.S. 114, 122. In any event, as we have pointed out in our main brief, the ultimate decision was made by the appeal board, which was free to follow or reject the Department's recommendation.

Packer. In respondent's brief, it is contended that he was erroneously classified 1-A because of "the arbitrary and capricious holding of the hear-

ing officer that since Packer was not a member of a religious sect or organization he could not be a conscientious objector" (Resp. br. pp. 163-175).

In support of this objection, Packer points to a sentence in the hearing officer's report,—“Registrant received religious training in a faith which is not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form.” Assuming that this statement by the hearing officer warrants the conclusion which Packer would draw from it, it cannot invalidate Packer's classification because the Department's recommendation was based upon the conclusion, amply supported by evidence, that Packer's claim was “based upon philosophical or sociological grounds or upon a personal moral code,” rather than upon religious training and belief as Congress has required in Section 6(j) (PR. 75).

In Packer's classification questionnaire, filed in July 1949, he ignored Series XIV calling for a statement of the registrant's conscientious objections, if any (PR. 58), and he did not request the special form for conscientious objectors until October 1950, several months after the outbreak of fighting in Korea.¹ In reply to questions 2 and 3

¹ Packer now claims that he had not originally claimed conscientious objection because he did not expect to pass his physical examination and did not wish to “go looking for trouble.” (R. 43-46).

of the special form for conscientious objectors, Packer stated in part as follows (R. 64-65):

I do not know whether my code of morals will be considered of a religious nature although I believe in a Supreme Being. This code, however, may very well stem from this Supreme Being. I had received a brief religious training in my early years, such as the study of the ten commandments and religious prayer which has a definite moral significance. This training has probably had a definite bearing on my subconscious.

My training also includes that given me by my parents, such as moral behavior in relation to society. These moral codes to which I adhere, is, I believe, inherited in my nature as in other peoples nature. It is a part of this Super Natural force.

Perhaps my belief can best be stated in the words of Mencius the immortal Chinese philosopher when he said. Human nature is good * * *

During the hearing before the Department of Justice hearing officer, Packer stated that his answers to questions 2 and 3 of the special form "pretty well express" his views (PR. 44). We submit that Packer's own statements, even when read with his testimony before the hearing officer, amply support the recommendation of the Department of

Justice that Packer's conscientious objections were based "upon philosophical or sociological grounds or upon a personal moral code", rather than upon religious training and belief. They also support the decision of the appeal board that Packer should be classified 1-A.

Respectfully submitted,

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ON CERTIORARI TO

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FOR THE SECOND CIRCUIT

JOINT BRIEF FOR RESPONDENTS

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SUMMARY OF ARGUMENT

One

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A Study of legislative history of the 1940 and 1948 acts shows a fair and just treatment intended for conscientious objectors. It shows that the term "appropriate inquiry and hearing" was used. A "fair hearing" was implied by the term "hearing". There is nothing explicit or implicit in the acts or the history of them that authorizes the procedure of withholding the F.B.I. report. The use of the word "hearing" implies a full and fair hearing. This commands production of the F.B.I. report. 32-98

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Davis, <i>Administrative Law</i> , §§ 75-76, pp. 268, 269, 272, West Pub'g Co., 1951	138
Duggan, <i>The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service</i> , pp. 113-115, Wash- ington, The Catholic University of America Press, 1946	42, 85, 88
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Selective Service, Washington, Vol. I, No. 12, December 1951	79
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Selective Service System, <i>Conscientious Objection</i> , Special Mono- graph No. 11, Vol. II, pp. 283-288, Washington, Government Printing Office, 1950	164
Sibley and Jacob, <i>Conscription of Conscience</i> , p. 73, Ithaca, N. Y., Cornell University Press, 1952	48
Townbee, <i>Study of History</i> , Vol. 5, p. 75	167
Universal Jewish Encyclopedia, Vol. 8, p. 31	167

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Wigmore on Evidence (3rd ed.) pp. 789-801	145, 146
YALE LAW JOURNAL, Vol. 59, pp. 1451-1466, "Government Immunity from Discovery"	18, 71, 155
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Supreme Court of the United States

OCTOBER TERM, 1952

No. 540

UNITED STATES OF AMERICA, *Petitioner*

v.

HARRY GRAY NUGENT, *Respondent*

No. 573

UNITED STATES OF AMERICA, *Petitioner*

v.

LESTER PACKER, *Respondent*

ON CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT BRIEF FOR RESPONDENTS

Opinions Below

United States v. Nugent, 200 F. 2d 46. [N 57-63]¹ *United States v. Packer*, 200 F. 2d 540. [P 49-51]²

¹ Figures appearing in brackets preceded by the letter "N" refer to the pages of the printed record in the *Nugent* case.

² Figures appearing in brackets preceded by the letter "P" refer to the pages of the printed record in the *Packer* case.

Jurisdiction

The judgment of the court of appeals in the *Nugent* case was entered November 10, 1952. [N 63] On December 5, 1952, Mr. Justice Jackson extended the time for filing petition for certiorari until January 9, 1953. [N 64] On March 16, 1953, certiorari was granted. [N 64]

The judgment of the court of appeals in the *Packer* case was entered December 31, 1952. [P 51] Certiorari was granted on March 16, 1953. [83]

Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a); Federal Rules of Criminal Procedure.

Questions Presented

Section 6 (j) of the Selective Service Act of 1948 provides that a person whose claim for exemption from service as a conscientious objector has been rejected by his local board may appeal to an appropriate appeal board. The appeal board is to refer the claim to the Department of Justice, which, after appropriate inquiry, is to hold a hearing and then make a recommendation to the appeal board. The appeal board considers (but is not bound to follow) that recommendation in reaching its decision.

The facts established by the undisputed evidence show that there were extensive F.B.I. reports made when respondents' cases were investigated by the Department of Justice. These F.B.I. reports were referred to and used by the hearing officers following hearings conducted by them and before their reports were made. The F.B.I. reports admittedly were not furnished to registrants by the hearing officers and were not included in the draft board files when the reports of the hearing officers and the recommendations of the Department of Justice were made to the appeal

boards and the draft board files returned to the appeal boards.

There was no request made by Nugent that he be given the F.B.I. report. Packer asked that the evidence in the F.B.I. report be shown to him. He was informed that the report had nothing in it unfavorable. The hearing officer in each case recommended against the conscientious objector claim because of the information appearing in the F.B.I. reports not made available to respondents.

The questions presented, therefore, are:

(1) Whether the failure to produce the secret F.B.I. reports so that respondents could answer them and the failure of the Department of Justice and the Selective Service System to include the reports in the draft board files violated the act, the regulations and the Fifth Amendment to the United States Constitution.

(2) Whether Section 6 (j) of the Selective Service Act of 1948, providing for investigation and appropriate inquiry, the Selective Service Regulations and the due-process clause of the Fifth Amendment to the United States Constitution, require the hearing officer of the Department of Justice to place every F.B.I. report used by him, favorable or unfavorable to the registrant, in the selective service file of the registrant.

(3) Whether the judgment of the court below in each case, regardless of the correctness of the opinion of the court below on the above questions, should be affirmed because of the invalidity of the classifications and the proceedings and the report and conclusions of the hearing officer of the Department of Justice and the Deputy Attorney General.

(4) Whether the trial court in the *Packer* case committed reversible error in quashing the subpoena duces tecum and declining to compel the production of the F.B.I. report.

Statute and Regulations Involved

Section 6 (j) of the Selective Service Act of 1948 (62 Stat. 609, 50 U. S. C. App. 456 (j)), provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service be deferred.

tiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—62 Stat. 609, 50 U. S. C. App. § 456 (j).

Section 13 (b) of the Selective Service Act of 1948 (62 Stat. 623, 50 U. S. C. App. 463 (b)), provides:

"All functions performed under this title shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 of such Act."

Section 3 of the Administrative Procedure Act (5 U. S. C. 1002) provides:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency— . . . (c) *Public Records*.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

The Selective Service Regulations, 32 C. F. R. Section 1622.20 (a), provide:

"In Class IV-E shall be placed any registrant who, by reason of religious training and belief, is found to be conscientiously opposed to participation in war in any form and

to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The Selective Service Regulations, 32 C. F. R. Section 1626.25 (c), (d), provide:

"(c) The Department of Justice shall . . . make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

As amended by Section 1 (q) of the Universal Military Training and Service Act of June 19, 1951 (65 Stat. 75, 86, 50 U. S. C. App., Supp. V, 456 (j)), Section 6 (j) of the Act of 1948 differs from the original provision quoted in the text in respects which are here immaterial.

Section 6 (j) of the Selective Service Act of 1948 pro-

vided that persons claiming exemption as conscientious objectors could either be ordered to perform noncombatant military service (the type for which Nugent was classified or, if the objections were found to preclude such service, be deferred. As amended by the Universal Military Training and Service Act of June 19, 1951, Section 6 (j) no longer provides for deferment, now specifying either noncombatant service or compulsory performance of "civilian work contributing to the maintenance of the national health, safety, or interest . . ."

As amended in 1951 by the Selective Service Regulations, Section 1622.14, registrants found to be opposed to combatant and noncombatant military service are placed in Class I-O.

Section 1622.20 (a) of the regulations applies to the classification given to Nugent. This regulation applies to Nugent because he was finally classified before June 19, 1951. The classification of Packer, however, is governed by the amended regulation, Section 1622.14.

Constitutional Provisions Involved

Amendment V to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of Cases

Nugent

During September, 1948, respondent registered. He filed a questionnaire dated February 2, 1949. [N 4] In his questionnaire he claimed conscientious objection to combatant military service. [N 4, 33] He stated that he would serve in the armed forces as a noncombatant conscientious objector. [N 4, 31] The local board failed to mail respondent the special form for conscientious objector (SSS Form No. 150) promptly but delayed the mailing of it for a period of twenty months. [N 4, 13, 21, 32]

Contrary to the statement appearing in the questionnaire that he would serve in the armed forces as a noncombatant [N 4, 31], respondent indicated in the conscientious objector form that he was opposed to both combatant and noncombatant service. [N 22-38] He explained that from the time he made his statement in the questionnaire in 1949 to the time that he filed his special form for conscientious objector in October, 1950, he had increased in his study and conviction of his religion, which made it impossible for him to serve as a noncombatant in the armed forces. [N 17-18, 23-26, 49-50]

On October 25, 1950, following the receipt of the special form for conscientious objector and supporting proof, the local board classified Nugent in Class I-A [N 4-5] He was mailed notice of this classification. [N 5] On November 4, 1950, he requested a personal appearance. [N 5] Thereafter he had a physical examination and was found acceptable. [N 5] Nugent was notified to appear before the local board on February 1, 1951, for his hearing. [N 5] Following the personal appearance he was placed in Class I-A-O (non-combatant conscientious objector classification) making him liable for service in the armed forces. On February 5, 1951, he was notified of this classification. [N 6]

Nugent appealed from this classification. [N 6] The appeal board tentatively denied his claim for classification as

a full conscientious objector (IV-E) and referred the case to the Department of Justice for investigation and hearing pursuant to Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25). [N 7]

After the investigation by the Federal Bureau of Investigation of Nugent's claim as a conscientious objector, the case was referred to the hearing officer for a hearing. [N 46] The hearing officer notified Nugent to appear before him. [N 9] Accompanying the notice were printed instructions dated September 1, 1948. [N 9, 54] The instructions notified Nugent that the hearing officer would inform the registrant of the general nature and character of any evidence adverse to his conscientious objector claim. [N 54] The notice stated that the registrant could make a full presentation at the hearing and bring witnesses. [N 54] The hearing was fixed for July 26, 1951. [N 15]

Pursuant to the instructions Nugent went to the office of the hearing officer and requested the adverse evidence. [N 10] The secretary of the hearing officer informed him that the "F.B.I. records are favorable" and that Nugent would have no trouble in getting his conscientious objector status. [N 10, 21] When asked by the secretary if he was going to bring an advisor, he informed her that since the F.B.I. records were favorable he saw no need of it. She responded, "That is right, because I feel you should have no trouble in receiving your desired classification because of the good recommendation from the F.B.I." [N 10-11] Because of this, Nugent thought that it would be unnecessary to have anyone present to assist. [N 10] Because of the representation and good-faith belief, Nugent's advisor, Martin Mitchell, who would have corroborated his conscientious objector claim, did not attend the hearing. [N 12]

At the time fixed for the hearing Nugent appeared. [N 12] He was prevented by the hearing officer from making a full statement of his claim, being cut off and told to answer questions with yes or no. [N 12] At the hearing the hearing officer did not mention the W.B.I. report or any adverse

statements appearing therein. [N 13, 46] The hearing officer had a stenographer present making a record. [N 15] The stenographic report of the hearing appears in the appendix to the brief for the petitioner. In the report of the hearing officer made to the Department of Justice reference is made to the religious group to which Nugent belonged. The hearing officer said: "Apparently each member is entitled to his own belief. Registrant's belief seems to be a free and particularly easy belief and religion, calling for little effort and practically no sacrifice." [N 46] This information must have come to the attention of the hearing officer through the F.B.I. report because it was not touched upon at the hearing. (See appendix to the brief for the petitioner.) There was no proof of this in the conscientious objector form or the documents submitted. [N 39-45] The hearing officer then added that Nugent's references "failed to make favorable impression, and most of them were conscientious objectors themselves". [N 46] This statement must have come from the F.B.I. report because none of the references appeared before the hearing officer but were interviewed by the agents of the F.B.I.—See appendix to the brief for the petitioner.

The hearing officer refers to "impressions gleaned as to" Nugent. He added that Nugent was "apparently shiftless, lazy, somewhat of a moral weakling . . .". [N 47] This information also must have come to the hearing officer's attention through the F.B.I. reports because it appears neither in the minutes of the hearing nor the papers submitted by Nugent. [N 32-45]—Appendix to the brief for petitioner.

The hearing officer impeached all of the statements made by Nugent and his references because none of them were made "prior to the national emergency" and, because of this fact, found that Nugent's claims "are not founded on truth in fact". [N 47] Notwithstanding his belief that the registrant should be denied both the conscientious objector

classification to combatant military service (I-A-O) and to noncombatant military service (IV-E) making him liable for full military service and a classification of I-A, the hearing officer recommended that Nugent be put in Class I-A-O solely because the local board had placed him in that classification. [N 47]

The recommendation of the Special Assistant to the Attorney General, based on the report of the hearing officer and the secret police investigative report, recommended that the registrant's claim "be sustained as to combatant military service only, and the registrant if inducted into the land or naval forces be assigned to noncombatant duties". [N 46] The Special Assistant to the Attorney General referred specifically to the secret police report made by the F.B.I., stating that Nugent, according to the report, is "inclined to be lacking in ambition". [N 47-48]

The appeal board classified Nugent in Class I-A-O. [N 8] He was notified to report for induction. [N 8] He reported and refused to submit, for which refusal he was indicted and convicted in the district court. [N 3]

Respondent appealed. [N 1] The court of appeals reversed the conviction because of the failure to produce the F.B.I. report and make it a part of the draft board file. [N 57-63] The judgment was reversed. [N 63] Petition for writ of certiorari in this case was timely filed.

Packer

In September of 1948 respondent registered with Selective Service Local Board No. 22, the Bronx, New York. A classification questionnaire was mailed to respondent, July 19, 1949. [P 13] It was returned by him on August 29, 1949. [P 13] The questionnaire showed his name and address. [P 53] It showed he had no previous military service. [P 54] It showed that he had never been married. [P 55] He worked at the millinery manufacturing concern of Gladys & Belle, Inc., as a purchaser of supplies. [P 55] He

showed that he had completed seven years of elementary schooling, three years of junior high school and was graduated from high school. In addition to this he showed that he had attended the City College of New York, taking a course of study in merchandising. [P 57] He is a United States citizen, having been born at New York on April 4, 1929. [P 57]

Respondent failed to sign Series XIV of the questionnaire requesting the local board to send him a conscientious objector form. [P 13, 14, 58]

On September 28, 1949, respondent was placed in Class I-A by his local board. [P 59] He neither appealed nor requested a personal appearance within the ten-day time limit fixed by the regulations. No further action was taken in his case by the local board until September 27, 1950, when he was ordered to report for a physical examination on October 4, 1950. He reported and was found physically acceptable. [P 14, 15, 59]

Sixteen days later the local board mailed him notice of classification (SSS Form No. 110), a card containing the usual notice. [P 14] On that same day, October 20, 1950, respondent requested a conscientious objector form. [P 15, 61] On October 23, 1950, the conscientious objector form was mailed to the registrant. [P 15, 59] On October 31, 1950, respondent returned the conscientious objector form properly filled out. [P 15, 59, 62-70]

He signed Series I (B) certifying that by reason of religious training and belief he was conscientiously opposed to participation in war in any form and that he objected to combatant and noncombatant military service. [P 62] He showed that he believed in a Supreme Being. [P 62, 64] He referred to his belief as a "code of morals" that may "very well stem from this Supreme Being". [P 64] He showed that his religious training in early years included a study and belief of the "ten commandments and religious prayer". [P 64] He stated that his belief he inherited as a

part of his nature and stated that "it is a part of this Super Natural force". [P 65]

Respondent explained fully the nature of his beliefs, showing that they are based on the Bible. [P.66-68] He did, however, also cite incidentally a Chinese philosopher on human nature, stating that human nature was inherently good and that if it remained good men would do no evil. He stated that the Chinese philosopher said "if men become evil it is not the fault of their original endowment". [P 65]

He further stated that "no man has the right to take the life of another human being regardless of circumstances. We are put on the earth by the will of God and by the will of God shall we depart". [P.68]

Respondent also gave references. He stated that he had never been a member of a military organization. He added that he was not a member "of a religious sect or organization". [P 69-70]

Two days after the conscientious objector form was received on November 2, 1950, the local board ordered that there would be no reopening of Packer's case. [P 15-16, 71] On November 7, 1950, Packer wrote a letter requesting a personal appearance or hearing out of time, in which letter he stated that he would welcome an F.B.I. investigation on his conscientious objector claim. [P 16, 71] The local board on November 16, 1950, denied the request for hearing. [P 16, 72] The next day the local board ordered respondent to report for induction on December 5, 1950. [P.16-17, 59]

On November 22, 1950, Col. Cobb, New York City Director of Selective Service, called in Packer's file for review. [P.59] The City Director on November 24, 1950, notified the local board that the mailing of the conscientious objector form to Packer and his returning it to the board should have reopened his case. The City Director informed the local board that they should have reclassified him and mailed him a new notice (SSS Form No. 110). The City Director, with a view to preserving the rights

of respondent, ordered the local board to send the file to the appeal board. [P 17-18, 72-73] The local board ordered the induction of Packer postponed on December 5, 1950. [P 18, 59, 73]

On December 6, 1950, the local board and the appeal agent reviewed respondent's file. [P 18, 59] The next day the file was sent to the appeal board. [P 18, 59] The appeal board on receipt of the file and review of it preliminarily denied the claim and referred the file to the Department of Justice for an appropriate inquiry and hearing on the conscientious objector claim. [P 18, 59, 74]

Four months later, on April 9, 1951, following the secret investigation conducted by the F.B.I., Packer was notified to appear before the hearing officer for an inquiry as to his conscientious objections. On April 9, 1951, respondent, on receipt of the notice and accompanying instructions, wrote the hearing officer a letter requesting to be provided with any unfavorable evidence. [P 18, 74-75] (The notice that the hearing officer mailed to the respondent invited him to request the hearing officer to provide the nature and character of any unfavorable evidence.) The hearing officer replied that he found no unfavorable evidence in the secret investigative report of the F.B.I. [P 43]

Respondent appeared before the hearing officer on May 7, 1951, the date fixed for the hearing. [P 40] The stenographic report made of the hearing showed that he informed the hearing officer that he went to a religious school until he was thirteen. Then he received his confirmation or his Bar Mitzvah. [P 44] He described his beliefs as the results of the Hebrew instruction received, that all humans are naturally good and that God is not only external but is also internal. [P 44] He stated that it is something "I have slowly developed within myself" and that it was basic in him. [P 45] As to his particular objections to participation in war he stated that he relied upon the commandment to love his neighbor and that he believed the commandment, "Thou shalt not kill." [P 45]

Respondent also informed the hearing officer that he would be willing, as a conscientious objector, to "assist in any welfare organization that the Government might establish, any humanitarian organization, rehabilitation work". He said: "I would be willing to give my service in anything that will be creative but not destructive." [P 46] The hearing officer asked him if he would be willing to participate in noncombatant service in the army. He stated that he would not. [P 46]

The hearing officer inquired of Packer why it was that he did not certify that he was a conscientious objector in his questionnaire and waited a year to request the conscientious objector form. [P 45] He stated that at the time he filed the questionnaire he intended to claim the conscientious objector status. He added that his friends advised him that he might not pass his physical examination and that if he made a conscientious objector claim he would be looking for trouble from the board. He stated: "Not knowing the procedure of a conscientious objector and not realizing that my rights would expire after a certain time, I took this advice." [P 45]

The hearing officer stated that, since the board had allowed him to make his claim, "that part of it is all right." [P 45] The hearing officer received from Packer verification of his conscientious objector status signed by two witnesses. [P 19, 46] Upon receipt of these he said: "There is nothing derogatory to you, Mr. Packer, in the FBI report; there is nothing you have to meet, employment record is favorable and your friends and neighbors seem to confirm your attitude." [P 46]

The report of the hearing officer to the Department of Justice found that respondent believed in a Supreme Being and that he had been trained in the "Decalogue and religious prayer as well as moral training from his parents". [P 40] He reviewed the report of the F.B.I. briefly. [P 40, 41] He referred to the written statement produced by respondent supporting his conscientious objection at the hearing.

[P 41]. He referred to respondent's religious schooling and quoted respondent as saying: "I had never really gone along with the ritual of my religion." [P 41] He referred to the description by respondent of his religious views supporting conscientious objection. [P 41-42] He repeated the explanation given by respondent of his delay in demanding the conscientious objector form. [P 42].

The hearing officer concluded that the Jewish religion was "not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form". [P 42]

He then added that he gave "no significance or weight to the fact that no statement of conscientious objection was made" in the questionnaire. The hearing officer said finally that respondent failed to establish that his objection "arises from religious training and belief". [P 42] He recommended that Packer be denied the conscientious objector claim and be placed in Class I-A. [P 42]

The Deputy Attorney General, on review of the draft board file, the secret F.B.I. report and the report of the hearing officer, recommended to the appeal board that respondent's claim as a conscientious objector be rejected because his beliefs "are based upon philosophical or sociological grounds or upon a person[al] moral code". [P 75] He added that he concurred in the recommendation of the hearing officer. [P 75]

On August 20, 1951, respondent was placed in Class I-A. [P 20, 76] He was notified of this classification on August 24, 1951. [P 21] An order to report for induction on September 14, 1951, was issued on August 30, 1951. [P 21] On that date respondent wrote a letter to General Hershey requesting a review of his file and an appeal to the president. [P 21]

76-78] On September 6, 1951, the local board wrote respondent that on August 30, 1951, they had reviewed his file again and again refused to reopen his case. [P 21, 78]

The City Director of New York, on September 6, 1951, wrote Packer that he refused to appeal the case to the president. [P 21, 79] On this same day the National Director, General Hershey, called the file in for review. [P 22, 80-81] Pending this review respondent was informed not to report for induction. [P 22] On September 14, 1951, his induction was postponed to October 16, 1951. [P 22] On October 2, 1951, the National Director notified Packer that no action would be taken on his request for an appeal to the president. [P 82-83] On October 16, 1951, he reported for, but refused to submit to induction, signing a statement certifying to his refusal. [P 23]

On November 19, 1951, by indictment in one count, he was charged with refusing to submit to induction. [P 1-2] Following a subpoena duces tecum issued by the respondent. He also made a motion to inspect the F.B.I. report. [P 2, 3-5] The Government moved to quash the subpoena duces tecum. [P 5-7] Respondent opposed the motion. [P 7-9] The motion to quash the subpoena was granted. [P 10] An order was made denying respondent the right to inspect the F.B.I. report before trial. [P 9]

Respondent waived the right of trial by jury. [P 10-11] Evidence was received. [P 10-34] Respondent was sentenced to the custody of the Attorney General for a period of four years. [P 39] Judgment and commitment was entered. [P 46] Respondent appealed. [P 47] The court of appeals reversed the conviction because of the failure to produce the F.B.I. report and make it a part of the administrative proceedings. [P 49] The judgment was reversed. [P 51] Petition for writ of certiorari in this Court was timely filed.

Summary of Argument²

One

A reasonable construction of Section 6 (j) of the Selective Service Act of 1948 requires access by the registrants to the investigative reports made by the Federal Bureau of Investigation.

A. Study of legislative history of the 1940 and 1948 acts shows a fair and just treatment intended for conscientious objectors. It shows that the term "appropriate inquiry and hearing" was used. A "fair hearing" was implied by the term "hearing". There is nothing explicit or implicit in the acts or the history of them that authorizes the procedure of withholding the F.B.I. report. The use of the word "hearing" implies a full and fair hearing. This commands production of the F.B.I. report.

Section 6 (j) of the act provides for the conscientious objector status. The classification is substantially the same as Section 5 (g) of the 1940 act. Hearings were had on Senate Bill 2655. Reports were made on the bill. In neither the hearings nor the reports is reference made to the hearing procedure prescribed by the Department of Justice. Congress concerned itself with two proposed changes in the act. One was that the presidential appeals be decided by a civilian agency separate from the National Director of Selective Service. This change carried; the National Selective Service Appeal Board was created.

The other suggested change was that the conscientious objector claims be taken entirely out of the hands of the Selective Service System and the Department of Justice. The proposed change advocated that the investigation and

² Relevant law review articles on some of the problems presented by these two cases are: (1) a note entitled "Validity of Confidential F.B.I. Report in Conscientious Objector Classification", 101 U. of Pa. L. Rev. 692-700; (2) an article entitled "Government Immunity from Discovery", 39 YALE L. J. 1451-1466; and (3) a note entitled "The Touhy Case: The Governmental Privilege to Withhold Documents in Private Litigation", 47 NW. U. L. Rev. 519-530.

classification of conscientious objectors be given to a separate and distinct agency. This proposal was rejected.

In the debates no discussion was had on the hearing procedure. It was referred to incidentally by Senator Gurney who opposed creating the separate conscientious objector agency. He said: "What we are after, really are the facts and the Department of Justice has always shown itself perfectly capable of uncovering the facts."—94 Cong. Rec. 7305.

There was no comment whatever by any member of either house on the practice of the Department of Justice in withholding from the conscientious objector and the appeal board the secret police report prepared by the F.B.I. None of the reports referred to this practice.

Report No. 1268, 80th Congress, Second Session, dated May 12, 1948, accompanying Senate Bill 2655, stated that classification of registrants would be "in accordance with a just system of selection". (§ VII (c)) Section 1 (c) of the act itself specifically provided for the fair and just system of selection intended by Congress.

Section VI of Senate Bill No. 1268, 80th Congress, Second Session, accompanying Senate Bill 2655, states that the 1948 act was intended to be substantially the same as the 1940 act. A consideration of the background of the 1940 legislation fails to throw any light on this subject. There is revealed no statement one way or the other on the use of the secret F.B.I. report. The hearings and the reports on the 1940 act describe the procedure briefly. The Department of Justice procedure is referred to in comments by members of Congress, the reports and the act. They mention "appropriate inquiry" and "hearing". There is no mention anywhere of a restricted "hearing". There is nothing said from which it can be inferred that the F.B.I. reports were intended to be withheld from the registrant and the appeal board.

The regulations promulgated by the president for the Selective Service System provide for no consideration of

secret evidence. These regulations command that the draft boards make available and a part of the records all evidence considered. (32 C. F. R. §§ 1621.8, 1623.1 and 1626.24) These regulations are a mere verbatim repetition of the regulations under the 1940 act.

However, from the inception of the Department of Justice procedure for "appropriate inquiry and hearing" the secret police report prepared by the F.B.I. on investigations of conscientious objector claims was withheld. (See 40 Op. A. G. No. 8 (1941).) The reports were held to be confidential under Order No. 3229 issued pursuant to R.S. 161 (5 U. S. C. 22).

The procedure followed by the Department of Justice on each claim of a conscientious objector referred to it by the appeal board will now be stated. The file is referred by the appeal board to the United States Attorney in the district where the appeal board is located. The United States Attorney then passes the file to the Department of Justice. The F.B.I. conducts the usual investigation.

The written report of the investigation by the F.B.I. is not restricted by rules of law. It includes hearsay, rumor, gossip, definite and indefinite information and conclusions. It contains also the names and addresses of the informants.

On the completion of the investigation the file and report are turned over to a district hearing officer of the Department of Justice. He notifies the registrant to appear for hearing. With the notice are also sent instructions.

Originally these instructions provided that the claimant be furnished with the general nature of unfavorable evidence upon request. This was available before hearing. The procedure was changed, shortly after the 1940 act went into effect. No longer was the adverse evidence provided by the hearing officer before the hearing, even when requested by the registrant. Arrangements were made (which is the procedure now) for the hearing officer to state generally the nature of the information that is unfavorable. No summary of the derogatory material is

made and provided to the registrant. Neither the F.B.I. report itself nor the names and addresses of the informants are given to the registrant.

The above procedure was well known to conscientious objectors under the 1940 act. Whether it was known by Congress or not cannot be determined. The enactment of the 1948 act, repeating as it did the substance of the 1940 act, cannot be taken as implicit approval of the procedure under the 1940 act by the Department of Justice withholding the F.B.I. report from the registrant and not including it in the files of the draft board. The suggestion that Congress approved the use of secret evidence by the Department of Justice is rejected by Section 3 (c) of the Administrative Procedure Act, Section 13 (b) of the Selective Service Act of 1948 and the provision in the act for a system of selection of registrants for service that is fair and just.

The use of the word "hearing" in the act without any restrictions dispels any thought that the star-chamber proceedings were approved by Congress. Congress knew that due process of law, guaranteed by the Fifth Amendment, requires revelation to the registrant of the complete F.B.I. report, since it was available and used by the hearing officer. Congress did not, therefore, intend to restrict the law on full and fair hearings in administrative agencies in the face of requirements for due process of law.

There is no justification for the procedure adopted by the Department of Justice. Investigation of conscientious objector claims is not like others made by the F.B.I. in criminal cases. The reason for nondisclosure of the names and addresses of informants in pre-sentence investigation reports made to judges in criminal cases does not exist. No danger to the country's national or international security inheres in conscientious objector investigations. These investigations are like any other administrative determination. The fact that investigation by the department is provided for in the draft law, an emergency measure,

does not alone make it the subject of national or international secrecy. No legal basis exists for sustaining the claim of privilege urged by the Department of Justice.

Every reason exists why there has been a waiver of the privilege. The appeal board relies on the recommendation of the department. The recommendation of the department is based on the report of the hearing officer. Both the recommendation of the department and the report of the hearing officer are grounded on the secret police report made by the F.B.I. Each had the full report in making recommendations.

It was withheld from the appeal board and the registrant. The denial of the conscientious objector claim by the appeal board results in liability for the training and service. The refusal to do training in the armed forces produces the prosecution. The missing link in the chain of proceedings is the F.B.I. report. This broken link destroys the due process required by the law, the act and the Constitution.

The departmental procedure for giving notice of the general nature of the derogatory information in the F.B.I. report to the registrant by the hearing officer does not comply with the law. It does not meet the requirements of due process. Rarely, if ever, is enough substance found in the notice to enable the registrant to answer and defend. It is never granted unless requested. Then it comes only at the hearing. No chance to prepare for the hearing on it is given. Registrants are not lawyers. Conscientious objectors are not trained in the proper procedure. They are not in a position to cope with the adverse evidence withheld by the hearing officer and used by him in recommending a denial of their claims.

The only thing that will satisfy the demands of a full and fair hearing envisioned by Congress is to give the full F.B.I. report to the registrant. It is for the registrant to decide what evidence in the F.B.I. report needs rebutting.

The prescribed procedure was not followed by the hearing officer in either the *Nugent* or the *Packer* case.

Both *Nugent* and *Packer* were unable to answer the adverse evidence at the hearing. They were unprepared for the departmental hearing. This was not because of their own fault, but because the act and the Constitution were not complied with by the Department of Justice.

Since Congress failed to explicitly approve the F.B.I. withholding procedure it must be assumed that the term "hearing" employed by Congress meant a full and fair hearing. A full and fair hearing is not had until the claimant is given an opportunity to rebut adverse evidence.

He also has the right to make use of any favorable evidence appearing in the F.B.I. report. The report is not solely for the benefit of the prosecutor. Congress intended that favorable and unfavorable facts be given to the appeal board. The appeal board has the responsibility of making the determination. This moral and legal obligation cannot be discharged if the investigator and the prosecutor, the Department of Justice, withhold from the tribunal a huge and vital chunk of the record or evidence. It seems plain that, although Congress was silent, it was not intended to approve the illegal star-chamber proceedings arranged by the Department of Justice.

B. The weight of authority in the decisions in point that deal with departmental Order No. 3229, forbidding disclosure of the confidential records, holds that the privilege of the F.B.I. must yield where the secret evidence is relied upon in reaching the determination.

Decisions on the point are not novel to administrative law. It is, however, new to find it decided in selective service cases. That the point was not raised in selective service cases until recently means nothing. No defense was permitted by the courts under indictments charging violations of the 1940 act until after the war was over.

Compare *Falbo v. United States*, 320 U. S. 549, with *Estep v. United States*, 327 U. S. 114. Since judicial review was possible and available under the 1948 act this point was raised timely.

The first case to be decided on the question of statutory construction was *United States v. Geyer*, 108 F. Supp. 70 (D. C. Conn. Oct. 10, 1952). This case was however, later than *United States v. Oller*, 107 F. Supp. 54 (D. C. Conn. July 28, 1952), holding that constitutional requirements of due process were violated by withholding the F.B.I. report. The *Geyer* case held that the report had to be produced because it was required by the act. The court held that a full and fair hearing and a fair and just method of selection (terms used in the act) compel the production of the report and its inclusion in the file. This same holding was followed by the court below in these two cases.

Imboden v. United States, 194 F. 2d 508 (6th Cir.), certiorari denied 343 U. S. 957, (decided before these cases) is not directly in point. In that case the court found that the F.B.I. report was made available to the registrant. The only objection was that the names and addresses of the informants were not disclosed. Here the complaint is much broader. It is that the secret evidence and information gathered by the F.B.I. in the police report illegally forms a basis for the classification. It is contended here that the use of secret evidence violates a full and fair hearing. This complaint was not made in the *Imboden* case (194 F. 2d 508):

The *Imboden* decision, even if found to be in point, is considered to be erroneous. It is subject to the same flaw as the withholding of secret evidence. There cannot be a proper defense or rebuttal to evidence without the source of the information being determined. Unless and until the evidence can be identified the registrant is completely in the dark. To be kept in the dark by a governmental agency is a violation of due process. It conflicts with the pro-

cedural rights guaranteed by a full and fair hearing intended by Congress.

Imboden v. United States, 194 F. 2d 508 (6th Cir.), is based on two fallacies. One is that the registrant has no constitutional right to the conscientious objector claim. The other is that the recommendation is purely advisory.

It has been uniformly held that it is not necessary to have a right guaranteed by the Constitution in order to be entitled to procedural due process in the determination of the right. Draft board proceedings have long been upset because they conflicted with the requirements of due process. The Department of Justice stands on no higher plane than the draft boards it was engaged to assist in the investigation of conscientious objector claims. The conclusion reached by the court in *Imboden v. United States*, *supra*, that the procedure should be approved because the right is not constitutionally guaranteed is factitious. It falls by its own weight.

The Sixth Circuit in the *Imboden* case (194 F. 2d 508) missed the mark and made a mistake on the other point. It held that the illegal procedure must be approved because the recommendation was merely advisory. The court overlooked the fact that the recommendation was relied upon in the case. It disregarded the fact that the classification by the appeal board made the Department of Justice proceedings a part of the selective service proceedings.

The decision in the *Imboden* case (194 F. 2d 508) should be rejected, therefore, because it is not in point. Also it should be overruled by this Court because it is inconsistent with the act, the regulations and the requirements of due process of law. The denial of certiorari in the *Imboden* case means nothing helpful here.

The decision in *Elder v. United States*, No. 13,405, Ninth Circuit, February 24, 1953, directly conflicts with that of the court below in each of these cases. The decision in the *Elder* case is erroneous for each of the reasons stated here why the position of the Government in these

cases is wrong. The holding of the court in the *Elder* case was made in blindness to former decisions by that court. —See *Chen Hoy Quong v. White*, 249 F. 869 (1918).

In the *Chen Hoy Quong* case, *supra*, the court held that an order denying an alien admission to the United States violated due process. The basis for destroying the administrative determination was that confidential evidence was relied upon by the hearing officer that was not disclosed to the alien. This case is directly in point with the facts in these two cases. It directly contradicts and impeaches the holding of the Ninth Circuit in the case of *Elder v. United States*; *supra*.

Other decisions by the Ninth Circuit holding that the use of secret evidence by an administrative agency is a violation of due process are *Mita v. Bonham*, 25 F. 2d 11, 12; *Ohara v. Berkshire*, 76 F. 2d 204, 207.

It is respectfully submitted that the holdings of the court below are in accordance with the intent of Congress. They properly construe the act. The decisions by the Sixth Circuit and the Ninth Circuit to the contrary ought to be rejected. This Court should approve the holdings of the court below in these two cases.

C. If the act is interpreted so as to authorize the procedure of the Department of Justice in refusing to disclose the F.B.I. report to the registrant and the board under Order No. 3229, then the construction will be unreasonable and produce penalties. This is condemned by this Court.

The law announced by this Court requires reasonable interpretation of statutes. A sensible construction of statutes must be adopted to escape oppression and injustice. The Court must presume that Congress intended to avoid unfairness.

A sensible and reasonable construction of "hearing" means a full and fair hearing. It cannot be presumed that

Congress intended to permit oppressive star-chamber proceedings.

If the interpretation placed upon the statute by the Government is accepted, then there is grave doubt as to the constitutionality of the statute. The construction would place upon the act a series of constitutional doubts. This condition of grave doubts as to constitutionality requires the construction here contended for. If it is accepted the constitutional question will be avoided.

Two

The investigations and hearings, using the F.B.I. reports, under Section 6 (j) of the Selective Service Act of 1948, must comply with due process of law, which demands that the investigative reports be shown to the registrants and also placed in their draft board files.

A. It is immaterial that the conscientious objector status is a grant from Congress and not a constitutional right.

Very few subjects within the jurisdiction of different administrative agencies are guaranteed by the Constitution. All are within the reach of the explicit provisions for use of police power by the Government, the commerce clause or the welfare clause. None has been held not to be within the protection of procedural due process because not guaranteed by the Constitution.

Draft board proceedings have repeatedly been declared to be unconstitutional when rights guaranteed by procedural due process have been violated. Why is the Department of Justice above the due-process-clause? Asking this answers that it is not.

The main issue for determination is whether the proceedings violated due process of law and not whether the subject matter is guaranteed by the Constitution.

B. Due process of law condemns star-chamber proceedings by administrative and judicial tribunals.

To try a person in his absence was a favorite practice of the Stuart judges. Reliance upon secret and withheld evidence was a common practice of the Court of Star Chamber. These evils were what the framers of the Constitution intended to shield the people of the United States from.

The procedure of withholding the secret police report prepared by the F.B.I. while using it to deny the conscientious objector claim of a registrant is identical to the practice of the Court of Star Chamber. This procedure is clearly not one of the general rules which govern society. It is not the law of this land. It is alien and should be rejected as contrary to due process of law.

C. Due process requires an opportunity to know the evidence used, even when confidential.

Where facts in secret reports are relied on by an administrative agency, failure to make them available to the parties and make them a part of the record has been held to be a violation of procedural due process.—*United States ex rel. St Louis Southwestern Ry. Co. v. I. C. C.*, 264 U. S. 64; *United States v. Abilene & S. Ry. Co.*, 265 U. S. 274; *Kwock Jan Fat v. White*, 253 U. S. 454.

The holding by the court below in each of these cases is in accord with *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123; *Chen Hoy Quong v. White*, 249 F. 869 (9th Cir., 1918); *United States v. Uhl*, 266 F. 2d 40 (2d Cir.); *Mita v. Bonham*, 25 F. 2d 11, 12 (9th Cir.); and *Ohara v. Berkshire*, 76 F. 2d 204, 207 (9th Cir.).

A case directly in point here (the first decision in the country under the draft law to hold that the use of the secret F.B.I. report is a violation of due process) is *United States v. Oller*, 107 F. Supp. 54 (D. C. Conn. 1952). That decision ought to be considered and approved here.

These cases are within the principle established by this

Court in the deportation cases.—*Kwock Jan Fat v. White*, 253 U. S. 454. See also *Kwong Hai Chew v. Colding*, 344 U. S. 590; 596, 597-598, 603. Compare *Shaughnessy v. United States ex rel. Mezei*, 73 S. Ct. 625.

Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, relied on by the Government, is not in point. There the hearing was legislative. The property rights of the protestant were not directly involved. Administrative remedies following the fixing of the tariff were available and had not been invoked. The case did not involve personal liberty. The cases here involve freedom of the person. This Court has made a distinction between property rights and personal liberty rights.

The case of *Williams v. New York*, 337 U. S. 241, on which the Government stands, gives way. It is no support for the contention of petitioner here.

That case involved a pre-sentence investigation report. The defendant had been previously found guilty of murder. There was possible danger to the informants of reprisal.

No duty required the court to follow the evidence in the pre-sentence investigation report. Here it is the responsibility of the Department of Justice and the appeal board to follow the undisputed evidence considered by them upon the consideration of the conscientious objector claim.

The discretion of the judge in the *Williams* case, *supra*, was unreviewable. No complaint could be made about punishment inflicted or findings of guilty so long as it did not exceed the limit fixed by law. Here there is a judicial review of the exercise of the administrative determination. A complaint can be made that if there is no basis in fact for the classification there is no jurisdiction.—*Estep v. United States*, 327 U. S. 114. The discharge of the Government employee case (*Bailey v. Richardson*, 182 F. 2d 46, 341 U. S. 918), relied on by the Government, is not in point for the same reasons.

The law, according to the greater weight of authority including the holdings by this Court, is that the withhold-

ing of evidence relied upon in administrative proceedings of any kind is a denial of due process. Since there was such a denial here the judgments of the court below should be affirmed.

D. Restrictive judicial review in draft cases (since it is confined to the administrative record) requires that the F.B.I. report be produced at the Department of Justice hearing for examination by the registrant and made a part of the administrative records, and this cannot be cured by even a production of it in court on judicial review.

This Court narrowed judicial review in criminal proceedings under the draft law. The review permitted is not so wide as that allowed in judicial proceedings involving other administrative determinations. There is no trial *de novo* permitted in proceedings brought to review draft board determinations.—See *Estep v. United States*, 327 U. S. 114; *Cox v. United States*, 332 U. S. 442.

Strict judicial review means strict compliance with all of the procedural requirements of due process.—Compare *Ver Mehren v. Sirmyer*, 36 F. 2d 876, 880, 881, (8th Cir.), with *Ex parte Fabiani*, 105 F. Supp. 139, 145-147, (D. C. Penna. E. D.).

E. The fact that records of the Department of Justice are confidential and privileged does not outweigh the requirements of procedural due process guaranteed by the Constitution, since the order of the Attorney General must yield to due process—the privilege is waived in the case.

In many situations where the Department of Justice has relied on Order No. 3229, issued pursuant to 5 U. S. C. 22, the courts have compelled the production of the F.B.I. report. The privilege of secrecy and the claim that the reports are confidential has many times been held waived. It is for the courts, and not for the Department of Justice, to say whether the confidential reports should be produced.

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The usual considerations that cause the privilege to override the necessity of producing the F.B.I. report do not exist here. State secrets are not involved. Executive discretion not touching personal rights is not under consideration. There is no danger of reprisals to informers. National security will not be undermined.

Every reason exists, however, why the production of the F.B.I. reports for the use of the registrant and the appeal board should be compelled.

Three

The judgments of the court below in each case should be affirmed for failure by the appeal board to give respondents a lawful classification and because the report of the hearing officer and the recommendation of the Department of Justice violate the regulations, the act and due process of law.

A. Nugent was deprived of his rights on appeal by the hearing officer's making an arbitrary and capricious report against Nugent; in his failing to give Nugent a chance to offer material evidence on important matters and in his secretary's telling Nugent prior to the hearing that he need not bring witnesses to the hearing.

B. Packer was deprived of his rights on appeal by the arbitrary and capricious holding of the hearing officer.

C. The denial by the appeal board of the conscientious objector status to Nugent and Packer was arbitrary, capricious and without basis in fact.

Four

Reversible error requiring a new trial was committed by the trial court in the Packer case by quashing the subpoena duces tecum issued to compel the production of the F.B.I. report of the trial.

Argument

One

A reasonable construction of Section 6 (j) of the Selective Service Act of 1948 requires access by the registrants to the investigative reports made by the Federal Bureau of Investigation.

A. Study of legislative history of the 1940 and 1948 acts shows a fair and just treatment intended for conscientious objectors. It shows that the term "appropriate inquiry and hearing" was used. A "fair hearing" was implied by the term "hearing". There is nothing explicit or implicit in the acts or the history of them that authorizes the procedure of withholding the F.B.I. report. The use of the word "hearing" implies a full and fair hearing. This commands production of the F.B.I. report.

The problem and need of a new selective service law was precipitated when the president on March 17, 1948, in his message to Congress demanded it.—See Senate Report No. 1268, dated May 12, 1948, to accompany Senate Bill 2655, at pages 1-2.

Hearings were had but no reference was made to the procedure for investigation of the conscientious objector claims or the use of the F.B.I. report. Complaints were made at the hearings about the determinations being made by General Hershey and other military personnel. Due to the objections by various religious organizations and peace groups, the bills that were introduced provided for the final determination of all claims on appeal to be made by a civilian national appeal board and not by General Hershey. This change is not important or relevant to the question considered here.

Following the Senate Report No. 1268, dated May 12, 1948, to accompany Senate Bill 2655 there was a conference report in the House of Representatives dated June 12, 1948, being Report Number 2438. This report adopted the House

provisions for the complete exemption of conscientious objectors from work and rejected the Senate provision for work by these objectors similar to that contained in the act of 1940. (See the report, on page 48.) Otherwise the report containing the bill that was ultimately to become the Selective Service Act of 1948 contained the same provisions for conscientious objectors as did the 1940 act.

When the bill (Senate Bill Number 2655) was debated in the Senate, a proposal was made to amend the act and provide for a special civilian commission outside the Selective Service System supplemented by inquiry and hearing by the Department of Justice. (94 Cong. Rec. 7277-7279, 7303-7304.) This proposed change in the act was due to statements appearing in the report of the Attorney General for 1944. References were made to his report and excerpts were copied into the Congressional Record. (See 94 Cong. Rec. 7278-7279, 7303-7304.) In conclusion Attorney General Biddle said: "The Congress may well consider the desirability of meeting these complexities by establishing a board to deal especially with conscientious objectors, having final discretion with respect to their proper individual classifications as well as their prompt assignment to suitable and useful work."—94 Cong. Rec. 7279.

Senator Morse during the discussion said: "We should see to it that the procedures which we adopt for the handling of conscientious objectors also square with the constitutional guarantee which is theirs. . . . [¶] But the fact that we cannot understand and do not understand and fully appreciate the religious faith and the spiritual beliefs of the conscientious objectors I think should make us over-cautious and cause us to lean over backwards to make certain we deal with exceeding fairness with the conscientious objector. We should make very sure that we give to him all the protections to which he is entitled under the Constitution."—94 Cong. Rec. 7303, 7304.

Senator Morse also said during the discussion that "we cannot have religious freedom under the Constitution of the

United States and then in practice deny it, even by way of limiting religious freedom by the procedure which we adopt and impose upon those who seek to exercise their full religious freedom under the Constitution". (94 Cong. Rec. 7277) And he quoted from the Report of the Attorney General for 1944, as follows: "In any further consideration of the selective-service legislation, or any future adoption of peacetime military training, it will be necessary to weigh the administrative, psychological, and ethical problems of conscientious objection which have not yet been fully solved." —94 Cong. Rec. 7279.

Concerning the proposed amendment that would take classification of the conscientious objector from the Selective Service System and place it with the special commission, Senator Gurney said: "Heretofore, the Department of Justice has investigated appeals which the objectors make from the local boards . . . What we are after really are the facts, and the Department of Justice has always shown itself perfectly capable of uncovering the facts. . . . The local selective service board, which classifies these men, would have no way in which to ascertain whether or not they were simply attempting to evade service, rather than having a bona fide conscientious objection. Therefore, striking that part of the section having to do with investigation by the Department of Justice would preclude the thorough investigation needed in these cases." (94 Cong. Rec. 7305-7306.) The proposed amendment suggested by Senator Morse was rejected.—See 94 Cong. Rec. 7307.

It can be seen, therefore, that when House Resolution 671, providing for a consideration of H. R. 6401, was finally considered, there was no specific discussion whatever as to the propriety of the investigative procedure pursued by the F.B.I. and the policy to withhold the secret investigative report from the registrant by the hearing officer and the Department of Justice.—See 94 Cong. Rec. 8419-8431.

A reading of the discussions and the reports on the bills that became the 1940 act and the 1948 act fails to reveal any

discussion on the use of the F.B.I. report. The subject of the investigation of, and hearing on, the conscientious objection claim was first discussed under the 1940 act. This investigative procedure was not provided for in the 1863 act or the act of 1917. Never was the use of the secret F.B.I. reports discussed under the 1940 act or 1948 act.

The general rules of due process have not been limited by the Congress. Due process required by the Fifth Amendment was in the minds of Congress when Congress provided in Section 13 (b) of the Selective Service Act of 1948 (50 U. S. C. App. 463) as follows:

"All functions performed under this title shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 of such Act."

Section 3 of the Administrative Procedure Act (U. S. C. 5, § 1002) reads:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating to the internal management of an agency- . . . (c) *Public Records*.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

These two strong provisions clearly show that Congress did not intend to narrow the constitutional requirements of procedural due process. Congress recognized the requirements of the Fifth Amendment making it necessary to have the records available when it enacted these provisions.

It seems that Section 13 (b) of the Selective Service Act of 1948 and of the Universal Military Training and Service Act provides for disclosure. The very fact that Congress in the act provided for an appropriate investigation and hearing constitutes a specific overruling of the Department of Justice policy regardless of whether this policy was in the view of Congress.

To understand the legislative history of the 1948 act the background of the 1940 act must be considered. The 1948 act being identical to the 1940 act in most respects, it is necessary to consider the history of the 1940 act along with the 1948 act. Senate Report No. 1268, 80th Congress, Second Session, dated May 12, 1948, accompanying Senate Bill 2655, indeed, under Section VI, discussing Section 6 (j) of the act, said concerning conscientious objection: "This section reenacts substantially the same provisions as were found in subsection 5 (g) of the 1940 act." Because of this references should first be made to the reports on the 1940 act, before taking up the 1948 act.

June 20, 1940, Senator Burke of Nebraska introduced Senate Bill No. 4164 in the 76th Congress, Third Session. On the next day Representative Wadsworth of New York introduced his bill in the House of Representatives, being H. R. 10132. The bills were referred to the Senate and House Committees on Military Affairs. During July and August of 1940 extensive hearings were held. Inasmuch as the bills contained provisions for the conscientious objectors similar to that contained in the 1917 act, objections were raised. The consequence was that the committee submitted a new plan for treatment of the conscientious objector. Amendments were offered. The House and Senate could not agree on the terms of the amendments. On August 5, 1940, the Senate in the 76th Congress, Third Session, reported on Senate Bill 4164 and provided in Section 5 (d) for a preliminary investigation and recommendation by the Department of Justice directly to the local board.

When the Burke-Wadsworth Bill was being discussed,

Mr. Walter of Pennsylvania introduced an amendment in the House to eliminate the original investigation and determination of the conscientious objector claims by the Department of Justice instead of the local board. The amendment was to place the responsibility first in the hands of the local board. The amendment carried.—See 86 Cong. Rec. 11689.

The Burke-Wadsworth Bill then went to a conference to harmonize the differences between Senate and House. The "Statement of the managers on the part of the House" in making their conference report on September 12, 1940, shows there was an original plan to refer the conscientious objector cases by the local board to the Department of Justice. The House amendment was accepted by the joint conference and an agreement reached that the conscientious objector classification would be first determined by the local board with the right of appeal. Among other things, the conference report reads: "Upon the filing of such appeal, the appeal board is directed forthwith to refer the matter to the Department of Justice for an inquiry and hearing. After appropriate inquiry by the proper agency of the Department of Justice, a hearing is to be held by the department with respect to the character and good faith of the objections."—86 Cong. Rec. 12038, 76th Congress, Third Session.

The same conference report made to the House was also made to the Senate on the next day.—See Hearings on Senate Bill 4164, 86 Cong. Rec. 12082, 76th Congress, Third Session.

The effect of this compromise was not to fix the type of hearing. It was solely to settle whether the conscientious objector classification was to be determined by the local board after a Department of Justice investigation or before the investigation.

House Report No. 2947 to accompany Senate Bill 4164 dated September 14, 1940, states, under "Conscientious Objectors", "After appropriate inquiry by the appropriate

agency of the Department of Justice, a hearing was held by the Department of Justice in the case of each such person with respect to the character and good faith of his objections."—See pages 17-18, House Report No. 2947, 76th Congress, Third Session, September 14, 1940.

◦ Senate Report No. 2002, on Senate Bill 4164, dated August 5, 1940, provided as follows: "The measure is *fair* both to a person holding conscientious scruples against war and to the Nation of which he is a part. It provides for inquiry and hearing by the Department of Justice to make recommendations as to whether a person claiming deferment because of conscientious objection to war is or is not a bona fide conscientious objector. . . . The rights of a conscientious objector and of the Government are fully protected against possible local prejudice, influence, or passion, by provision for appeal to a board of appeal."—Senate Report No. 2002, 76th Congress, Third Session, p. 9. (Emphasis added)

The Senate placed emphasis upon the word "fair". The act would not be fair to a registrant if he were permitted to be deprived of his liberty by evidence received secretly by the administrative agency. He would be unjustly dealt with if the administrative agency made a determination based upon evidence kept from him. Congress intended that the word "fair" have the broadest possible meaning when applied to administrative procedure intended to be used in the selection of registrants for service. The connotation placed upon the word "fair" by courts of justice would necessarily conclude that Congress intended to condemn secret investigations and classification of registrants made without notice and knowledge of all the evidence relied upon by the administrative agency.

Had Congress intended to place upon the word "fair" a narrow and restrictive meaning, certainly it could have and would have limited the meaning of the term. It could have provided for the secret hearing and the determination made without knowledge of the facts by the registrant.

Failure of Congress to so provide spells out a clear intent of Congress to require all the evidence, including the secret F.B.I. reports, to be included in the draft board files.

After the denial of the conscientious objector classification by the local board and a preliminary denial of such claim by the appeal board, the registrant is entitled, as a matter of right, and the Government is required to grant, an investigation and hearing by the Department of Justice. *Conscientious Objection*, Special Monograph No. 11, Vol. I, page 89, Selective Service System, Washington, Government Printing Office, 1950, states: "The System's board of appeal then referred the case to the Department of Justice for inquiry and hearing, which agency after taking such action made recommendation to the appeal board on the type of service. Neither the World War I nor Civil War enactments contained such special instruction."

The procedure followed by the Department of Justice under the 1940 act is described by Joseph C. Duggan, formerly of the Department of Justice. He handled a large amount of the processing of conscientious objector cases in the department up until June 1945. He is quoted by General Hershey thus: "The investigation in this type of case is an inquiry into the character of the registrant, and is undertaken to determine whether he has the religious training and belief required by the statute, whether he is sincere, and whether his daily conduct is consistent with his professed claim for exemption as a conscientious objector."

"Upon completion of such inquiry, the registrant's file and the investigative report are then transmitted to a Special Assistant to the Attorney General designated as hearing officer under section 5 (g) of the Selective Service Act."

"The hearing officer thereupon issues a 'notice of hearing' to the registrant and furnishes him with a copy of the instructions governing the conduct of the hearing. The notice of hearing allows the registrant 10 days in which to

appear, and informs him that he may bring any witnesses or documentary evidence to the hearing in order to substantiate his claim. . . . While no exact counterpart of the hearing officer is known to the System, he is a quasi-judicial officer who acts in a capacity analogous to that of a trial examiner."—Selective Service System, *Conscientious Objection*, Special Monograph No. 11, Volume I, page 126, Washington, Government Printing Office, 1950.

General Lewis B. Hershey, in this same publication entitled "Conscientious Objection", *supra*, said: "It was well known that these cases were carefully investigated by the Federal Bureau of Investigation, although the report of the investigation of that Bureau was not contained in the information forwarded to the board of appeal. In a large number of cases, however, the Hearing Officer's report, which was forwarded to the board of appeal and was placed in the registrant's Cover Sheet (thereby being made available to the registrant himself) contained references to the investigation by the Federal Bureau of Investigation. . . .

"The Department of Justice and Selective Service took the position that each time the case of a registrant who claimed to be a conscientious objector came before a board of appeal, the case must be referred to the Department of Justice for its recommendation. This was felt to be the direct application of the law. In addition such reference was necessary because *new factors* in the case might be brought to light by the Department's investigation and hearing. . . . [Emphasis added] .

" . . . The Department even went further by having the Federal Bureau of Investigation make a special investigation of the registrant and a Hearing Officer conduct hearings for him to provide exhaustive material on conduct, training, and belief. These data were basic also when the State Director or the Director of Selective Service was considering an appeal to the President and when the Presidential Appeal Board was engaged in classifying."—Selective Service System, *Conscientious Objection*, Special

Monograph No. 11, Volume I, pp. 147, 150, 155, Washington Government Printing Office, 1950.

The very fact that "new factors", emphasized above, might be "brought to light" by the investigation and hearing meant that the "light" would be available for the use of the registrant and the appeal board as well as the Department of Justice. Certainly Congress did not intend that "new factors" would be within the knowledge of the Department of Justice and withheld from the registrant. Surely Congress did not intend that the Department of Justice have the only "light". The registrant was entitled to have the "light" discovered by the Federal Bureau of Investigation. The appeal board (the agency that finally determined the matter) is especially entitled to the "light" found by the Department of Justice through the F.B.I. report.

The withholding of the report from the registrant and the appeal board keeps the "light" away from the very ones who need it. The registrant is vitally concerned over his classification; the ultimate and final responsibility for classification is placed on the appeal board. That agency is also vitally interested in getting the "light".

It is contrary to the intention of Congress that the Department of Justice withhold the "light" from the appeal board. Surely Congress did not intend that the registrant and the appeal board be kept in darkness while the Department of Justice bask in the "light".

The Director of Selective Service also states that the purpose of the investigation and hearing is to provide "exhaustive material". If this material is to be "exhaustive" for the use of the appeal board, it must be intended by the law that the complete F.B.I. report be made available to the appeal board. The exhaustive material is kept in the secret files of the Federal Bureau of Investigation of the Department of Justice. The Department of Justice, therefore, does not provide the administrative agency, charged with

the responsibility of classification, with the needed "exhaustive material on conduct, training and belief".

It seems, therefore, that the fair and reasonable interpretation of the act and regulations clearly indicates that the complete F.B.I. report must be made available to the registrant and included in the draft board file when it is returned to the appeal board.

Joseph C. Duggan, former Assistant to the Attorney General, in charge of the processing of conscientious objector cases, in his own book (published before the above monograph) entitled "The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service", Washington, Catholic University of America Press, 1946, says (pp. 113-115), among other things:

"If the Board of Appeal should classify the registrant in a deferred class, or exempt him as a conscientious objector in accordance with the nature of his claim therefor, it shall record its decision and return the file, generally through the office of the State Director, to the Local Board of origin. (Section 627.25) . . .

"Reference to the Department of Justice pursuant to Section 5 (g) of the Act and Section 627.25 (a) (4) of the Regulations is effected by transmitting the file to the United States Attorney for the federal judicial district in which the Board of Appeal is located. The United States Attorney thereupon examines the file to determine whether the Department of Justice has jurisdiction and, if he so determines, the file is transmitted to the nearest Field Office of the Federal Bureau of Investigation for appropriate investigation. ([Footnote:] The procedure for handling cases referred to the Department of Justice is outlined in Departmental Circular No. 3461, as amended, dated February 11, 1941. Through June, 1945, approximately 12,000 cases had been so referred. Administration of the conscientious objector provisions of the Selective Service Act is supervised by a division in the Department separate

and distinct from that charged with enforcement of the penal sanctions of the Act.) The investigation in this type of case is an inquiry into the character of the registrant, and is undertaken to determine whether he has the religious training and belief required by the statute, whether he is sincere, and whether his daily conduct is consistent with his professed claim for exemption as a conscientious objector.

"Upon completion of such inquiry, the registrant's file and the investigative report are then transmitted to a Special Assistant to the Attorney General designated as Hearing Officer under Section 5 (g) of the Selective Service Act.

"Footnote 112 on page 114 states:] (This report is confidential in character and enjoys immunity from disclosure of its contents like all other executive documents. (See *Ex parte Sackett*, 74 F. 2d (C. C. A. 9) 962 and 40 Op. A. G. No. 8 (1941).) In the interests of fairness, however, the claimant—conscientious objector is given an opportunity to rebut or explain any evidence which tends to defeat his claim. Paragraph 4, Revised Instructions to Registrants, Supp. No. 4, Department of Justice Circular No. 3461, dated Oct. 12, 1942.

"The Hearing Officer thereupon issues a Notice of Hearing to the registrant and furnishes him with a copy of the instructions governing the conduct of the hearing. The Notice of Hearing allows the registrant ten days in which to appear, and informs him that he may bring any witnesses or documentary evidence to the hearing in order to substantiate his claim. The Hearing Officer has no power of subpoena and the appearance of the registrant is entirely voluntary. While no exact counterpart of the Hearing Officer is known to the system, he is a quasi-judicial officer who acts in a capacity analogous to that of a trial examiner.

"The sole question before the Hearing Officer is whether or not the registrant is entitled to be classified in accordance with his claim for exemption. He has no advisory jurisdiction over any other Selective Service classification but he

can sustain, partially sustain or deny the claim for conscientious objector classification.

"The hearing accorded the registrant before the Hearing Officer is informal and nonlegalistic, and in no sense is the registrant deemed to be on trial. By observation and examination at the hearing, the Hearing Officer attempts to prove the conscience of the registrant and to determine, on the basis of the record, the investigation and the hearing, whether he is a sincere, religious objector.

"After concluding the hearing, the Hearing Officer prepares a report in triplicate in which he makes a recommendation to the Department of Justice. ([Footnote:] Contrary to the intimations of the Second Circuit Court of Appeals in *U. S. v. Kauten*, 133 F. 2d 703 (1943), *U. S. ex rel. Reel v. Badt*, 141 F. 2d 845 (1944) and *U. S. ex rel. Phillips v. Downer*, 135 F. 2d 521 (1943), recommendations are made to the Boards of Appeal by the Department of Justice and not the Hearing Officer. This is in strict conformity to the statute.) This report containing findings and conclusions of law, together with his recommendation relative to the registrant's classification, is transmitted to the Office of the Assistant to the Attorney General in the Department at Washington for examination and review.

"It is possible that the report may be returned to the Hearing Officer with a memorandum of disagreement from the Department. If, however, the Department concurs in the findings of the Hearing Officer, it proceeds to make a recommendation to the Board of Appeal from which the case originated. This recommendation is generally made by adopting, approving, and concurring in the advisory recommendation of the Hearing Officer to the Department. ([Footnote:] The Department, however, may overrule the Hearing Officer, and make a recommendation different from his. In such instances, the Hearing Officer's report is submitted to the Board of Appeal for purposes of information.) Upon return of the file, together with a recommendation to the Board of Appeal, the administrative function of the

Department in conscientious objector cases is complete.

"The subsequent proceedings by the Board of Appeal consists of consideration of the recommendation made by the Department of Justice. The Board of Appeal is not bound by the recommendation of the Department but it is required only to give consideration thereto, and thereupon it proceeds to classify the registrant and transmit its decision to the registrant's Local Board. ([Footnote:] S. S. R. Sec. 627.25 (c). The persuasive weight of the recommendation of the Department of Justice is disclosed by the fact that out of 2,699 recommendations made between July 1, 1943, and June 30, 1944, the Boards of Appeal failed to concur with the Department in only 132 cases. REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR ENDED JUNE 30, 1944, 13.)"—Duggan, *The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service*, pp. 113-115, Washington, Catholic University of America Press, 1946.

It is noticed that Mr. Duggan says that the registrant is given an opportunity to refute and explain in "the interest of fairness". The word "fairness" includes a fair hearing. A fair hearing means that all of the evidence used by the hearing officer must be produced and made a part of the draft board file. The word also carries with it the responsibility of supplying the registrant with the adverse evidence. The duty does not end with providing a registrant with adverse evidence, however. The registrant and the appeal board are both entitled to have the benefit of even all the favorable evidence.

Repeatedly, throughout the Government's brief, the statement is made that it "is clear that Congress" never contemplated a disclosure of the F.B.I. report. It several times says that Congress meant to deprive the Selective Service System of "sources of information necessary for making" the recommendation. It is difficult to understand why it is so clear to the Government. After citing all of the statutory

history on the 1917 act, the 1940 act and the 1948 act, it admits that there is nothing on the subject. It says that Congress never considered or discussed this point. The Government is blowing hot and cold. First it says Congress did not; next it says Congress did. Which is it? Yet it has the temerity to say that Congress intended that the F.B.I. report be kept from the registrant. Why it could be said to be "clear" when Congress said nothing about the procedure is difficult to understand. Perhaps the Government has entered into the field of metaphysics or the occult science and is now using supernatural powers.

Mr. Duggan, in the above report, also says that the report of the hearing officer is transmitted to the appeal board "for purposes of information". How can the appeal board have information needed by it if the F.B.I. report is withheld? When it receives only the report of the hearing officer, that is not sufficient. It is only part of the Department of Justice record.

This need of the appeal board is very eloquently stated by Mr. Wallace W. Brown, Chairman of the Appeal Board for the State of Connecticut. His repeated letters to the Attorney General requesting the complete F.B.I. report appear in the record in *United States v. Pekarski*, No. 221, October Term, 1952, United States Court of Appeals for the Second Circuit. (See Appendix A below, pp. 184-196.). The Department of Justice refused to produce the secret F.B.I. report requested by the chairman of the appeal board in the *Pekarski* case. Because of such failure the appeal board ultimately denied the full conscientious objector claim made by Pekarski. A copy of the record in the *Pekarski* case is filed with the clerk of this Court as an exhibit to this brief. —See pages 83-86, 92-96, 100-105.

The Government has not been satisfied with this grievous injury to the rights of the registrant. It has recently, by Executive Order No. 10363, June 17, 1952, gone a step further and added insult to injury by now completely with-

holding from the appeal board and the registrant the report of the hearing officer.—See Section 1626.25 of the Selective Service Regulations, as amended.

The question may be asked, How did the procedure of neither making the secret police investigative report a part of the file nor showing it to the registrant originate? It came about in this way. The 1940 act was silent on the type of hearing that was to be conducted. The Department of Justice had its Order No. 3229 made by the Attorney General pursuant to R. S. 161. The statute (5 U. S. C. 22) and the order make confidential and privileged against general inspection the records of the Department. This was by the Attorney General extended to the secret investigative reports of the F.B.I. of the conscientious objector cases. 40 Op. A. G. No. 8 (1941). The Department of Justice, naturally, observed the order and the opinion of the Attorney General.

The Department of Justice recognized that due process of law required some kind of notice to the registrant of the adverse evidence appearing in the F.B.I. secret report. Accordingly, in conformity with what the department considered to be the minimum, the procedure for handling cases referred to the Department of Justice was outlined in Departmental Circular No. 3461, as amended, dated February 11, 1941.

That required a written notice to be mailed to the registrant by the hearing officer following the investigation and F.B.I. report to appear before him for a hearing. Accompanying this notice was a set of written instructions stating that the registrant could, upon request to the hearing officer, be informed "as to the general nature and character of any evidence" which is unfavorable to, and tends to defeat, the claim of the registrant. Such request being granted to enable the registrant more fully to appear, to answer and refute at the hearing such unfavorable evidence".

This right to demand a statement of the unfavorable

evidence before appearing was short-lived. It was stopped in October of 1942. In *Conscription of Conscience*, Ithaca, Cornell University Press, 1952, Sibley and Jacob state: "Prior to October 10, 1942, he could ask for such a statement before his hearing. After that date, the request had to be made at the hearing. This change was criticized by many advisers of conscientious objectors on the ground that it left the applicant in the dark until the time of the hearing. On the other hand, the Department of Justice claimed that clerical help was not available to make the earlier procedure practicable; that under the new rule, the Hearing Officer could (to afford the applicant time to rebut contentions in the F.B.I. file) postpone the hearing until a later date or invite the applicant to submit written material; and that in 80 per cent of the cases before Hearing Officers, objectors did not utilize their right to ask for unfavorable testimony in F.B.I. reports."—Page 73.

The Government argues that the only thing that the conscientious objector claimant does not get is the identity of the witnesses whose information appears in the F.B.I. report. This is whitewashing the fact that the F.B.I. investigation report is not given to the registrant. The law demands this; until it is supplied, there is much more than nondisclosure of the identity. There is an absolute denial of an opportunity to reply to the unfavorable F.B.I. report.

In Section 6 (j) of the act Congress provided for a full opportunity to establish the sincerity of the claim. This was through the requirement of appropriate inquiry and hearing. The device put forth by the Department of Justice as a substitute for this requirement defeats the very purpose of Congress. The Department of Justice comes forth with a mere shell. The notice that is mentioned as being given to the registrant is never available to him unless he requests it.

He does not get the notice before the hearing. He learns about the adverse evidence only at the hearing. Even then he cannot be sure that he gets all of the adverse evidence.

He does not have the names of the witnesses. He does not have the exact nature of the statements made.

At most the hearing officer gives him only general and illusive statements. This is a mere makeshift. It does not satisfy the requirements of the "hearing" provided by Congress. He finds himself blindly engaged in a struggle with the Department of Justice. This is not a hearing contemplated by Congress.

The change of procedure whereby the registrant was no longer permitted to obtain the substance of the adverse evidence appearing in the F.B.I. report before the hearing but was forced to wait until he appeared at the hearing seems to be covered by paragraph 4, Supplement No. 4, Department of Justice Circular No. 3461, dated October 12, 1942.

In these cases the instructions were sent to each registrant so that he could request the adverse evidence. The law says he is entitled to a full and fair hearing. The Department of Justice admits this. If each respondent was entitled to a full and fair hearing, is this not a concession by the Department of Justice that a "fair" hearing was required? It is only after a "fair" hearing that there is jurisdiction to report on the conscientious objector claim. A report based on an unfair hearing is certainly in violation of the act and regulations.

The Government admits that the notice of unfavorable evidence in the F.B.I. investigative report in each of these cases is not typical. But it refers to the report of the hearing officer made in *Imboden v. United States*, 194 F. 2nd 508, 510 (6th Cir.). Respondents deny that the report of the hearing officer to the Department of Justice in the *Imboden* case is typical of the notice given. The summary of the F.B.I. investigation appearing in the hearing officer's report is not the notice that is given to the registrant. The reports in the *Nugent* and *Packer* cases would

have enlightened the Court more than that made in the *Imboden* case.

This Court ought not to be misled by the summary of the F.B.I. investigation appearing in the report of the hearing officer. The summary appearing in the report is not seen by the registrant until after the appeal board determination, when the file is sent back to the local board.

What is given to the registrant is not in advance of the hearing by the hearing officer. It is oral notice of the general nature of the evidence. It is not a specific summary such as appears in the quotations from the opinion in the *Imboden* case made by the Government in footnote 18, page 59 of its brief. It seems that the Government has thrown this quotation into its brief for the purpose of having the Court infer this is the type of summary given to the respondents in these cases. Nowhere is there any Government proof that such a summary was offered to the respondents. The testimony of each respondent was that there was no such summary given as appears in footnote 18 of the Government's brief.

It should be remembered that in the *Nugent* case Hearing Officer Gallagher did not follow the instructions that he mailed to Nugent. While his secretary misled Nugent, he concealed the unfavorable evidence he had and which he relied upon.

The Government makes a big point about its furtive procedure being known to conscientious objectors and conscientious objector organizations. Now just what benefit to the Court is this? Suppose that they were aware of it? Does knowledge of violations of law legalize the invalid procedure? Since when does law violation become legal merely because it is known even to the public or to a minority group? Knowledge or even consent on the part of thousands—yes, even hundreds of thousands—of conscientious objectors means nothing.

The fact that this question has not been raised in the many cases that were prosecuted under the 1940 act also means nothing. In the thousands of prosecutions under the 1940 act no defense of any sort was permitted. The whole problem was to establish the right to make any kind of defense. The barrier set up by the Department of Justice and the courts was finally overcome in the case of *Estep v. United States*, 327 U. S. 114. Then the war was over. No further prosecutions were conducted. It was impossible to raise this point at all in any of the prosecutions under the 1940 act. Assuming that this point could have been raised, the fact, however, that it may not have been urged when it could have been means nothing. That only twenty per cent of the registrants requested to be notified of the adverse evidence proves nothing. The law and the intention of Congress are not to be determined by the practice of innumerable registrants. It should be kept in mind that registrants come from the general cross section of the population. They are not lawyers. They cannot be presumed to have a knowledge of their rights. Congressional intent is to be imputed only from the language. No solace to the Government on its contention can be gained from the fact that only twenty per cent of the registrants requested the hearing officers to tell them of the unfavorable evidence.

It is the responsibility of the Department of Justice to make the F.B.I. report available to the registrant regardless of whether it was requested by him. If Congress intended that all of the evidence should be made available to the administrative agency, the fact that the registrant did not request the hearing officer to supply the evidence is wholly irrelevant and immaterial. Fairness required the evidence to be produced. The fairness of the administrative agency does not hang on whether the registrant requested the adverse evidence or the F.B.I. report to be produced. The Government's contention that it is necessary for the registrant to request the adverse evidence or the F.B.I. report

makes the procedure on a conscientious objector hearing a game of chance.

The Government takes the position that the procedure outlined by the regulations of Department of Justice Circular 3461, as amended February 11, 1941, is "clearly adequate". It says that the department supplies the registrant with a summary of the evidence and the adverse contents against him.

While the giving of this inadequate notice, or the failure to give a full summary of the police report, is entirely immaterial to the question of whether it is the duty of the Department of Justice to produce the full F.B.I. report to the registrant at the hearing, the fact remains that the notice actually given was inadequate according to procedural due process, even though the law does not require the production of the report or a copy of it.

The Government argument that the above described departmental procedure of furnishing notice of the adverse evidence is adequate overlooks much. How can a registrant be sure that he is given *all* of the adverse evidence? How can the Court depend upon hearing officers giving adequate notice in every case? Since when must secondary notice be taken as a substitute for the best evidence? It is perfectly all right for the administrative official to make a report of oral evidence given by a witness at a hearing. No objection can conceivably be raised to this. If the report is inadequate, the registrant who was present and heard the oral evidence could correct it. He could protect himself from an inadequate record.

But here the registrant does not know what the evidence is. How can he combat an inadequate notice? How is he able to protect himself against omissions of the hearing officer? When the primary evidence is in writing and is available, how, in the name of truth and justice, can anyone say that it is adequate when none of it is given?

It is a fundamental rule of evidence that documentary

evidence, which is the best evidence, must be used. Secondary evidence, such as an oral description of the document or a secondary summary, may not be used. Secondary evidence may be used only when the best evidence is not available. In this case the best evidence was available. The Government refused to produce the F.B.I. report which was at hand.

It seems obvious that the Congress that passed the 1940 act, as well as the 1948 act, intended that selection of registrants must be made by fair and just standards. Senate Report No. 1268, 80th Congress, Second Session, dated May 12, 1948, accompanying Senate Bill 2655, stated: "This subsection enunciates the principle that the obligations and privileges of serving in the armed forces should be shared generally, and in accordance with a just system of selection." (§ VI (c)) The act itself so provides.—See § 1 (c).

This provision is almost identical to the provision appearing in the Selective Training and Service Act of 1940. "The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service."—Sec. 1 (b), 54 Stat. 885.

A fair and just selection of registrants cannot be accomplished without a full and fair hearing. The act and regulations contemplated that the hearing before the hearing officer of the Department of Justice was to be a full and fair hearing. Had the local board used outside written evidence and refused to disclose it to the registrant, this would have been a violation of the regulations. (32 C. F. R. §§ 1623.1, 1626.24) If the local board must accord the registrant notice of adverse evidence so that he can refute it or make it available to him by reducing it to writing and putting it in the file, it seems only just and proper that the secret investigative police report of the F.B.I. used by the hearing officer and the Department of Justice should be

included in the file and made available to the registrant at the hearing. Without doing this, there is not a full and fair hearing contemplated by the act.

The president, in promulgating the Selective Service Regulations, provided that there must be a full and fair hearing before the system. If there is the executive policy to require a local board to notify a registrant of all adverse evidence, then fairness should clearly mean that the executive policy requires similar conduct on the part of the Department of Justice. The Selective Service Regulations constitute an executive interpretation of the act. This interpretation requires that all evidence considered by the system be reduced to writing and placed in the registrant's file. There is nothing in the executive interpretation of the act that in any way justifies the policy of the Department of Justice in withholding the F.B.I. report from the registrant and appeal board.

In addition to providing for appropriate investigation, a hearing and a notice of the hearing to the registrant, the Selective Service Regulations, Section 1626.25 (c), provide the registrant with an opportunity to be heard. This means an opportunity to be heard on all the evidence. He is not to be heard only on one side of the case. "Hearing" means that he has the right to answer the other side. Section 1621.8 of Selective Service Regulations provides that all papers pertaining to the registrant shall be placed in his selective service file. Since Section 6 (j) of the act provides that the investigation shall be into the character and good faith of the conscientious objections of the registrant, then the investigation pertains to the registrant and to nobody else. Keeping the investigation report out of the file is, therefore, a violation of this regulation.

Section 1 (c) of the 1948 act has provided high standards for the selection and drafting of registrants. If the selection is to be fair and just, then all evidence used in the case including evidence obtained in the F.B.I. report must be

disclosed to the registrant. There can never be a fair and just determination when the evidence is concealed.

The Government argues that since Congress was not constitutionally required to provide for any particular kind of appeal procedure, the practice of the Department of Justice should be approved by the Court. Congress did provide for an appeal procedure. It used the word "hearing". This word was not limited in its definition. The hearing was to determine the right granted by the act. The right given was the conscientious objector status. The very fact that a hearing was provided for means a full and fair hearing was intended. This requirement cannot be side-stepped on the specious argument that Congress was not constitutionally required to provide for any sort of hearing. Congress did provide. That is sufficient.

The Government says that Congress is free to provide a type of procedure considered appropriate. This assumes that Congress established the procedure in question. Congress did not establish this particular procedure. It was evolved by the Department of Justice. It was not envisioned by Congress.

It would be impossible to get all of the facts merely by a one-sided investigation. The interpretation by the Government of the act is not a fair one. When the Senate Armed Services Committee brought in its final report under the proceedings for the adoption of the 1940 act it said that the appeal procedure was fair to both sides—not one side—in providing for an investigation and a hearing. Certainly it cannot be fair to the registrant as well as the Selective Service System if only one side can get all of the evidence and the conscientious objector claimant is given only such evidence as the Department of Justice is willing to disclose.

It should be remembered that even Congress does not, in its own ordinary hearings, receive evidence in camera. In hearings it does not receive one-sided evidence. It always hears both sides. The hearings are open. All sides are per-

mitted to hear all testimony. Why and how can it be assumed that Congress intended to approve police-state practices of concealing the evidence?

Conscientious objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (See Selective Service System, *Conscientious Objection*, Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, *supra*, at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven'."

The petitioner in its brief begins the history of the governmental treatment of conscientious objectors in American history with the 1917 act.

As appears above, the Selective Service System in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution. (*Ibid.*, pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.*, page 37) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized to grant special benefits to noncombatants under Section 17 of the act, approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

"No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers."

... These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—*Ibid.*, pages 42-43.

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by this Court in *Girouard v. United States*, 328 U. S. 61. In that case, this Court, speaking through Mr. Justice Douglas, said that "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion granted by the First Amendment is the product of the struggle. As we recently stated in *United States v. Ballard*, 322 U. S. 78, 86, 'Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624.' . . . Over the years Congress has meticulously respected the tradition and even in time of war has sought to accommodate the military requirements to the religious scruples of the individual. We do not believe that Congress intended to reverse that policy when it came to draft the naturalization oath. Such an abrupt and radical departure from our traditions should not be implied. (See *Schneiderman v. United States*, 320 U. S. 118, 132.) Cogent evidence would be necessary to convince us that Congress took that course."—328 U. S. 61, at pp. 68-69.

In passing the provisions for conscientious objection to war in the draft laws of 1940 and 1948, Congress had this long history in mind. It intended to preserve the freedom of religion and conscience in regard to conscientious objection, and it provided a machinery whereby such freedom could be preserved. Part of this machinery was the investigation by the Department of Justice, a hearing and an opportunity to be heard. (32 C. F. R. 1626.25 (c).) This investigation must have been provided so that the honest conscientious objector could prove his claim. In view of the history of conscientious objection it would not be right to interpret the investigation as one-sided or a police-state hunt for evidence against the registrant and to hide anything from the registrant that he might be able to use to prove his claim. That would even be inconsistent with the grant of an opportunity to be heard after the investigation. The opportunity to be heard came after the investigation. If the intention was to grant an opportunity to be heard without all the evidence afforded by the investigation, the opportunity for the registrant to be heard would have been afforded before the investigation.

It cannot be imputed that the Congress intended to undermine the fair treatment that was intended by the 1940 act and 1948 act. The evolution of the treatment of the conscientious objector under the 1863 and 1917 acts to the more liberal provisions of the 1940 and 1948 acts shows a definite intent on the part of Congress to prevent basic and fundamentally unfair treatment by an administrative agency which would be condemned in any other case. Surely if the withholding procedure would be invalid under any of the proceedings that are reviewed by the Emergency Court of Appeals it would be invalid in this case.

There must be some compelling policy of emergency to read into the act an intent to treat the conscientious objector unfairly. The holding of this Court in *Kwong Hai Chew v. Colding*, 344 U. S. 590, is appropriate. In that case the alien

was deported without a hearing. In reversing the lower court's sustaining the Attorney General, this Court said:

" . . . Where neither Congress, the President, the Secretary of State nor the Attorney General has inescapably said so, we are not ready to assume that any of them has attempted to deprive such a person of a fair hearing.

"This preservation of petitioner's right to due process does not leave an unprotected spot in the Nation's armor.

"For the reasons stated, we conclude that the detention of petitioner, without notice of the charges against him and without opportunity to be heard in opposition to them, is not authorized by 8 C.F.R. § 157.57 (b). . . ."—344 U.S. at pp. 601-603.

Furthermore, Section 6 (j) of the act as amended provides that registrants who are recognized as conscientious objectors shall be assigned to work affecting the national health, safety and interests. Congress did not intend that a person who ought to be available for work affecting the national health, safety, or interests should spend his time in jail because he did not know the secret evidence. It is important for the purpose of utilizing all available manpower to allow a conscientious objector to prove his proper status upon all the evidence in the case including the F.B.I. report.

Section 13 (b) of the Selective Service Act of 1948 (50 U.S.C. App. 463), when properly interpreted, requires a full and fair hearing. While Section 3 (c) of the Administrative Procedure Act (5 U.S.C. 1002) may not be invoked to provide the usual remedy for review of the administrative agency determination, reference can be made to that act for what constitutes a fair hearing in the eyes of Congress. Section 3 (c) of the Administrative Procedure Act shows a congressional policy against concealment of records.

In *Elder v. United States* (No. 13,405, 9th Circuit, February 24, 1953) the court reached a conclusion contrary to

that of the court of appeals in these cases. Circuit Judge Healy said that "in the absence of clear intimation in the statute to the contrary the court will not assume that Congress intended these investigative reports to be made public". Note 5 at the very end of the opinion comments: "The court can not assume that Congress was unaware of this departmental policy. In an amendment to § 6 (j) of the Act made June 19, 1951 no change was effected in the provisions thereof quoted in note 3, supra."

The legislative history shows conclusively that there was neither a discussion of nor consideration of the use of the secret police reports in the hearing of conscientious objectors. There was no occasion to consider the illegal practice in the passage of the 1940 act. The question was not drawn to the attention of Congress when the 1948 act was considered.

Members of Congress unequivocally stated that all rights of the conscientious objector should be protected. It was expressly stated in the reports and in the act that the process of selection or classification should be fair.

The contention of the Government that re-enactment of the provisions of the 1940 act by the 1948 act without objection approved such procedure is not borne out by the terms of the 1948 act. This act, in Section 13 (b), provides that Section 3 of the Administrative Procedure Act shall be applicable to functions performed by officials under the 1948 act. Section 3 (c) provides for disclosing official records to a party interested in these proceedings.

It is argued by petitioner that although the hearing procedure was never specifically complained about, the peace organizations and conscientious objector people were aware of the practice. The Government then argues because these groups failed to complain to Congress, there was acquiescence in the iniquitous practice of withholding the F.B.I. report. How can it reasonably be contended that violations of the rights of conscientious objectors were acquiesced in by witnesses before Congress?

When witnesses for the conscientious objector groups were before Congress giving testimony, the questions being considered by Congress did not include the hearing procedure. The only questions under consideration were: (1) whether the presidential appeal board should be composed entirely of civilians and separate from the influence of the Selective Service Director, and (2) whether the entire investigation and appeal determination of the conscientious objector status should be handled exclusively and separate by an independent agency, thus taking the entire procedure, including the improper hearing, out of the Department of Justice.

Never at any time in the hearings or in the discussions before Congress was the subject of the F.B.I. report or the nature of the hearing conducted by the Department of Justice considered. These two subjects were completely omitted from all of the discussions leading up to the passage of the 1948 act.

It should be kept in mind that the representatives of the conscientious objector organizations did not bind every conscientious objector in the country by their mere silence. The spokesmen before Congress on the two questions were not acting as representatives of all the conscientious objectors in the country. It is neither fair nor reasonable to contend that Congress approved the illegal procedure of the Department of Justice.

The enactment of the same procedure in the 1948 act that was provided in the 1940 act did not adopt the illegal procedure. Congress did not consider the procedure or indicate they knew of objection to it. If they did then surely it must be assumed that Congress intended to let the courts correct the illegality. It was not the duty of Congress to perform the function of this Court which is now invoked. It is submitted that it would be lawful and proper for this Court to conclude that the legislative history shows a clear purpose to treat the conscientious objector fairly. If so, then the

The administration under the 1940 act became different from that under the 1917 act because no provision was made in the 1917 act for an investigation or hearing.

It is true that the Secretary of War created a board of inquiry during World War I. The members of the board interviewed the registrant concerning his claim. But this type of proceeding had nothing whatever to do with evidence or court process. There was no procedure for getting evidence from other people or from the registrant himself. Such a procedure is hardly like the procedure provided for under the 1940 and 1948 acts.

The Government makes reference to the board of inquiry for conscientious objectors appointed by the Secretary of War. These men, including Dean Stone and Judge Mack, heard conscientious objectors under the 1917 act. The procedure under the 1917 act was not satisfactory. For this reason the investigation, hearing and ultimate classification procedure under the 1940 act were established.

No benefit can be derived from a consideration of the procedure followed by the board of inquiry. It merely interviewed registrants. It made no classifications. It considered no outside evidence. It had before it no secret police report or the benefit of an F.B.I. investigative report. There was no withholding of any evidence from the registrant. The board members merely interrogated the conscientious objector. They made their report and findings. They did not undertake to make a recommendation based upon an exhaustive investigation like that available to the hearing officer and the Department of Justice under the 1940 act and the 1948 act.

We can be sure, however, that men like Harlan Fiske Stone and Judge Julian Mack would neither approve nor resort to police-state procedure, nor consider secret undisclosed evidence to be legal as the Government does here.

The methods of investigation and procedure of the board of inquiry set up in 1918 by the Secretary of War, as out-

lined in the Government's brief, have no bearing upon the requirements of the 1940 and 1948 acts, which required an appropriate investigation and hearing by the Department of Justice.

During World War I, the registrant checked Series 9 of the selective service questionnaire in order to make a claim for conscientious objector deferment. If the local board allowed the claim, the registrant received a certificate from the local board.—See *Conscientious Objection*, Special Monograph No. 11, Vol. I, Selective Service System, 1950, at page 51.

The reason for exemption from combatant service only is found in Section 4 of the 1917 act. It provided in part as follows:

“... but no person so exempted shall be exempted from service in any capacity that the President shall declare to be non-combatant.”—*Conscientious Objection*, *op. cit.*, page 49.

The setting up of the board of inquiry by the Secretary of War in 1918 was a gratuitous act, a dispensation on the part of the Secretary. Under the 1917 act, no board of inquiry could grant conscientious objector status. The local board alone had this power. Those conscientious objectors who had been recognized already had their certificates from the local boards.

The only function performed by the board of inquiry was to consider requests made by conscientious objectors who already had certificates of recognition of their claim, for deferment from noncombatant service. This was not allowed by law and the conscientious objector had no standing to insist upon any hearing or further grant. In addition to that, the board of inquiry undertook to determine whether it ought to recommend conscientious objector status to those whose claims were not allowed by the local boards, or to those who were making the claim for the first time. There was nothing in the law allowing or requiring this pro-

cedure. The registrant, therefore, had no authority to make any demand of anything. He could make a request which could be respected at the whim of the board of inquiry. —*Conscientious Objection, op. cit.*, pages 57, 59, 60.

The army also granted many exemptions without the assistance of the board of inquiry. The new method set up by the 1940 act, putting into the hands of the Department of Justice the requirement of an investigation and a hearing with notice of the hearing to the registrant, was to be altogether different. Here was the grant of a right. If the investigation were not made or the hearing not held, the classification would become a nullity. The classification process was still going on before the Department of Justice. In 1918 the classification process had already been completed when the board of inquiry came around to see whether it would use some charitable dispensation not recognized by law. No one can complain of a lax hearing when the law does not require a hearing. But, when the law does require a hearing, as did the 1940 and 1948 acts, then the party affected may not be prejudiced by an unfair hearing.

A change of procedure for classifying conscientious objectors from the 1917 act was contemplated by the 1940 act. See *Conscientious Objection, Special Monograph No. 11, Vol. I* by Selective Service System, 1950, at page 67:

"As has been seen, such provisions were similar to those covered by the Selective Service Law of 1917. In the consideration of the 1940 bill, however, a number of suggestions were made for changes. These may be generalized under four headings: . . . providing for special methods of classifying conscientious objectors . . ."

The Government refers to the historically informal procedure for hearing appeal classifications. Congress could have used the same language that it used in the 1917 act had it intended to continue the same procedure used thereunder. However, Congress saw fit to change the 1940 and the 1948 acts so that they provided for "an appropriate investigation and a hearing".

The Government refers to the history of the selective service acts to make the court believe that the type of inquiry and hearing now in use by the Department of Justice is the one that was intended by Congress. However, no act of Congress before the 1940 act provided for an inquiry and a hearing. If Congress meant for history to continue as it had been in the past it would not have used the language changing the methods of the 1917 act.

No emergency demanding the procedure complained of is expressly stated in the act. None can be found in the legislative history. Since the act and regulations give all registrants the right to be informed of the nature of the adverse evidence used by the draft boards (32 C.F.R. 1621.8, 1623.1 and 1626.24), it must be assumed that Congress also intended that the same fair treatment be given to the registrant by the Department of Justice. Does the Department of Justice perform a function different from the board as far as a hearing is concerned? Does the act give the department an immunity that the boards do not have? If Congress wanted to give the Department of Justice a prerogative to be unfair while the draft boards did not have the right, would not Congress have said so?

The registrants have still further reason why Congress intended that the F.B.I. report should be made available to them on their hearings before the Department of Justice. Regulation 32 C.F.R. 1621.8 provides that all papers pertaining to a registrant shall be filed in his cover sheet. It reads in part: "... Every paper pertaining to the registrant, except his Registration Card (SSS Form No. 1) and such other papers and documents as may be designated by the Director of Selective Service shall be filed in his Cover Sheet (SSS Form No. 101) until authorization to remove it has been received from the Director of Selective Service."

A report resulting from an investigation by the Department of Justice into the "character and good faith of the conscientious objections of the registrant" (32 C.F.R.

1626.25 (c)) most certainly pertains to the registrant. This report also pertains to the registrant because it is used by the hearing officer to determine his recommendation of classification of the registrant.

Since the F.B.I. report should have been put into each respondent's cover sheet, it was subject to his inspection under the regulation that allows a registrant to see all papers in his file (32 C.F.R. 1606.32 (a)), which reads, in part: "(a) Information contained in records in a registrant's file may be disclosed or furnished to, or examined by, the following persons, namely: (1) the registrant . . ."

The above regulation proves that the Selective Service System sees the intent of Congress to give a full and fair hearing.

The present regulations of the Selective Service System carry out the law. They merely repeat the words of Congress used in the 1940 and 1948 acts. They take nothing from it. Section 1626.25 of the Selective Service Regulations (32 C.F.R. 1626.25) provides in subdivisions (c) and (d) as follows:

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification

of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Attention is called to the above-quoted words, "opportunity to be heard," in Section 1626.25 (c). This again emphasizes the fact that the president has interpreted the draft law to require a fair hearing. Opportunity to be heard cannot be exercised unless all the evidence is produced. The executive interpretation requiring an opportunity to be heard before the administrative agency carries with it the same right to be confronted with the evidence before the Department of Justice appearing in the secret F.B.I. reports. The word "hearing" in the Department of Justice should be given the same interpretation that the word "hearing" has in the Selective Service System. Both departments function under the same act. It would be inconsistent to give the word "hearing" one meaning in one department and a different meaning in another department. Why does a registrant have the right to be confronted with evidence in the Selective Service System and not have it when he is before the investigative arm of the system under the act, the Department of Justice?

Should we adopt the view that Congress did not intend that the F.B.I. report should be revealed to a registrant, then we are attributing to Congress an intention to defeat its own purpose. Congress knew the history of conscientious objection and, beginning in 1940, extended the class of conscientious objectors to include all religious objectors and not only those connected with historic peace churches. An interpretation that would restrict the recognition of conscientious objectors not in accordance with the wishes of Congress ought not to be tolerated. By allowing the Department of Justice to conceal the F.B.I. report there is

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put into its hands a dangerous weapon. A hearing officer of the Department of Justice would be given the power to make his report according to his own prejudice, bias or whim. He could ignore vital evidence in favor of the registrant and magnify minor things into monstrosities. He could draw unfavorable conclusions from the F.B.I. report without ever giving the registrant a chance to know or meet that evidence. The hearing officer could make his report to the appeal board so strong that the registrant would have no chance, although he might have been able to show otherwise had the report been made available to him. Hearing officers have a tremendous influence upon the decision of the appeal board, even though they are only advisory.

How many religious objectors have been sent to jail because the F.B.I. report has been concealed nobody knows. But just because we cannot be specific is no reason to believe that justice has been done under a system of concealment. The public gets a wrong impression when conscientious objectors are sent to jail. They feel that the man has been disallowed his claim because he is a "draft dodger". This brings the cause of conscientious objection into disrepute and should not be allowed without the results of the F.B.I. investigation being made known to the registrant. Overzealous hearing officers, in a time of stress, might make such flagrant reports of conscientious objectors, based upon secret evidence, that the cause itself could be seriously impaired, if not endangered.

By concealing F.B.I. reports we put a religious man at the mercy of the atheist, the evil-minded and the base. It comes to the point where any person desirous of dealing religion a black eye can with impunity attack a man's conscientious scruples. The religious objector has no defense to this without knowing the evidence, and the chances are that he will go to jail because an unscrupulous person is believed and a rebuttal is deemed unnecessary. While administrative hearings are not judicial trials they should be conducted in the open, to avoid the injustices mentioned

above. On this see *YALE LAW JOURNAL* 1451, at page 1466: "Suppression of evidence has little to commend it on any theory, and it is even less defensible when the Government litigates with its own citizens."

The F.B.I. report often is filled with hearsay and adverse statements made by witnesses who may hate or despise the registrant rather than love him as their neighbor. The report may be glutted with conclusions and opinions. It may be filled with ~~damaging name-calling, slurs from~~ persons based on rumors, malice, gossip and hearsay.

It is the policy of the F.B.I. to take statements of any kind and character from any person. (See material on F.B.I. practice brought to light in the Bohlen case, Appendix B to this brief, at pages 197-203.) The F.B.I. does not censor the evidence that it receives. Every kind and character of statement without regard to its legality, source or effect is incorporated in the report.

These reports are handed to the hearing officer. Regardless of how honest the hearing officer may be, it tries his integrity to the limit not to be influenced by this poison that is turned over by the F.B.I. without regard to the rules of evidence.

Since the hearing officer must of necessity be influenced by this evidence there is every reason under the sun why the report must be submitted to the registrant so that he might help the hearing officer do his duty and protect himself. All of this unlimited poisonous material appearing in the F.B.I. report should be qualified by the registrant. If it is not explained away then it will be used against him in the criminal proceedings. This is true, however, though the proceedings are administrative. They ultimately become the basis for criminal prosecution. This poisonous adverse evidence is used against the registrant in criminal proceedings, therefore, without his ever having had an opportunity to rebut the charges, either in the administrative proceedings or in the criminal proceedings against him.

The Government argues that the procedure followed by

the hearing officer prescribed by the Department of Justice is adequate. It says that since the registrant "knows better than anyone else" all facts and their manifestations, the disclosures made by the hearing officer are adequate against "mistaken or malicious statements". Mistaken or malicious statements appearing in the F.B.I. report often are the basis for the recommendation against the claim and the classification denying the conscientious objector status.

If this mistaken or malicious evidence is not directly, pointedly and unequivocally rebutted, no matter how great a number of witnesses may appear in behalf of the registrant, he still is unable to protect himself from the malicious hearsay and gossip relied on by the hearing officer.

The reason for this is that once the classification is established there can be no weighing of the evidence in court proceedings. Not only is there no weighing of the evidence, there is no *de novo* trial. The secret evidence can never be inspected. The registrant never has an opportunity to protect himself against the falsehood or malice in the report that never gets into the record. Unless the registrant is confronted with the precise adverse evidence he cannot rebut it. A general statement of the nature of the evidence is insufficient to enable him to cope with or meet it.

The Government argues that the matters involved upon a conscientious objector hearing are peculiarly within the knowledge of the objector and of persons available to him. This may be true as far as the true facts of his life are concerned. It may be so also as to his beliefs. But these are not the only facts that are dealt with in an F.B.I. report.

A typical illustration of this danger appears in the case of *United States v. Annett*, 108 F. Supp. 400 (D. C. Okla. W. D. 1952). In that case Judge Wallace held that Annett was charged with notice that his "sincerity" and "background" were in issue. He then held that it was unnecessary to make a disclosure of the specific derogatory statements relating to his "sincerity" and "background". The court held that since Annett was charged with the notice about

his sincerity it was unnecessary to make a specific disclosure to him.

The danger of this sort of proceeding is indescribable. There is no limit to which administrative agencies may take the people in dealing with them if there is no precise disclosure of the particular adverse evidence.

The petitioner contends that the evidence in the F.B.I. report comes from persons close to the registrant such as friends, neighbors, teachers. It says these are important checks upon the registrant's statements and those of his selected witnesses. It then goes on to say that these friends are the very informants who do not want to disclose evidence unless their identity is hidden. It is our contention that if a person reports that he is a friend of the registrant and is willing to give adverse information against his friend but will conceal from the registrant the fact that he has given adverse information, this is a sign that such person is not a friend but is an enemy. Should the department attach such weight to adverse evidence, basing it upon an elusive supposition furnished? The very fact that a witness refuses to disclose his identity is basis for rejecting his entire testimony. The only exception to this is in cases where his life may be endangered by giving information about a criminal or gangster. It should be remembered, however, that a conscientious objector is not a criminal or gangster. He is "the friend of the informant".

The Government makes reference to the fact that persons interviewed by the F.B.I. are persons "close" to the registrant. The Government then goes a step further and says that these "close" persons always have intimate knowledge of the registrant. A distinction should be made between the close friends and neighbors. A man may have many neighbors who live close to him; yet they will not know very much about him, not so much as close friends and business associates in very distant places. It is a well-known fact that in many cities and towns neighbors know very little about each other. It is entirely different from

small communities and country areas. The Government's use, therefore, of "close persons" to the registrant should be taken with this qualification.

Petitioner places a great deal of weight on its argument that it is necessary to keep the identity of the informants secret. It is said that precise evidence so as to make a disclosure is unnecessary.

The Government says that people who give evidence to the F.B.I. are unwilling to submit to impeachment or cross-examination. The convenience of informants not to have the truthfulness of their statements questioned does not outweigh the tremendous injury that is committed against the victim of secret evidence. If this type of consideration is accepted by the Court, it means permission to administrative agencies to side-step due process of law. Then the end of due process is at hand and the return to the ancient and condemned star-chamber proceedings is here.

If the Court allows this sort of administrative proceedings to be established, the end of truth is at hand. It is more important that truth be the aim of a hearing. Even though evidence is subjected to contradiction, it is better that truth be preserved in the administrative agency. If evidence can be furnished to an administrative agency without being submitted to impeachment and cross-examination, then it will encourage lying, perjury, malice, gossip and all manner of violations of rights and liberties. There would be no end to its evil consequences.

The Government states in its brief that at best the Department of Justice will be hindered in formulating recommendations if there is a disclosure of the names of persons who furnish the information. Are we to deprive registrants of the truth? Surely a report can be made even where witnesses are subjected to a disclosure of their names. Even if the names may not be disclosed, there is still the necessity of furnishing to the registrant all the evidence appearing in the report.

It is argued that the recommendation of the Depart-

ment of Justice is only advisory. The fact of the matter is that while it is advisory, if and when it is accepted, the appeal board in fact relies completely on the recommendation of the Department of Justice which is, of course, based on the information appearing in the F.B.I. report. This report is not available to the registrant but is available to the hearing officer and the Department of Justice. It is never given to the registrant.

To prove that in practice the report was more than merely advisory General Hershey, in *Conscientious Objection*, Special Monograph No. 11, Volume I, Washington, Government Printing Office, 1950, makes a compilation of cases through June 30, 1946, under the Selective Training and Service Act of 1940 and then states: "Data presented in Table 4 show, however, that over three-fourths of the recommendations of the Department of Justice were carried out by the boards of appeal, and that the Class I-A recommendations were more completely agreed to by the appeal boards than any other classification recommended." —Pp. 146-147.

It is apparent from this report by General Hershey of the record of classifications that, although the recommendation of the Department of Justice is advisory, it was usually followed, especially where the I-A classification was recommended by the department. The "Report of the Attorney General for the Fiscal Year Ended June 30, 1944", shows that the recommendations of the Department of Justice were followed in all but 132 cases out of 2,699 between July 1, 1943, and June 30, 1944. —See page 13 of the Report.

The Government states that 95 per cent of the hearing officers' recommendations are concurred in by the Department of Justice. This concurrence necessarily follows the concealment of the F.B.I. reports from the registrants. Since the registrant is unable to rebut the evidence contained in the F.B.I. report, there is no alternative left to the Department of Justice but to follow the recommendation of the hearing officer.

Furthermore this F.B.I. report is withheld from the appeal board. This further deprives the registrant of a fair chance to get the proper classification to which he is entitled. The appeal board, not having all of the evidence before it, is not enabled to evaluate properly the recommendation of the Department of Justice. We find that the Department of Justice has set up a very peculiar type of procedure.

Under that procedure the hearing officer and the Department get the F.B.I. report in spite of the fact that they merely make a recommendation and do not classify. The appeal board, which is charged with the final duty of making a classification, never gets the F.B.I. report. This inequality is an absurdity and an anomaly. Documents which should be in the possession of the judge are withheld from him because the prosecutor has said that it is more important for the prosecutor to keep the documents from the judge. The appeal board (the judge) has hardly any alternative but to follow the recommendation of the Department of Justice (the prosecutor), since it does not have the real evidence with which to guide itself. That is why many registrants are deprived of their proper classifications.

The Government's brief states that the "expansion of the 1940 law no longer limited its provisions to members of recognized peace churches". It further says that the problem of appraising sincerity of others outside of the peace churches became acute. This is the reason why a new procedure had to be devised, it says. For the first time the Government says it was confronted with the problem of investigating the good faith of conscientious objectors who were not members of any religious organization.

Under these circumstances we agree that a more thorough investigation was necessary. As Senator Gurney said in the congressional debates on the 1948 act, the Department of Justice was interested in getting all of the facts and the investigation would disclose all of the facts. If all of the

facts were to be gotten they had to be gotten by disclosing the evidence in the possession of the F.B.I.

It is well to consider the language of Mr. Justice Black, dissenting in *Shaughnessy v. United States ex rel. Mezei*, 73 S. Ct. 625, at page 632. There he said: "No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. Russian laws of 1934 authorized the People's Commissariat to imprison, banish and exile Russian citizens as well as 'foreign subjects who are socially dangerous'. Hitler's secret police were given like powers. German courts were forbidden to make any inquiry whatever of the information on which the police acted. Our Bill of Rights was written to prevent such oppressive practices."

The rule of the exclusion cases does not apply to draft cases; but the rule in the deportation cases does. It is well to consider, therefore, the language of the Court and the dissenting justices in the case of *Shaughnessy v. United States ex rel. Mezei*, 73 S. Ct. 625. This was an exclusion case. In that case, for security reasons, the Court approved the exclusion of an alien without giving him the adverse evidence.

The Court recognized the difference between the requirement of due process in exclusion cases and that applied in deportation cases. The Court said: "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."—73 S. Ct. at page 629.

The views of the dissenting justices in that case ought also to be considered insofar as they relate to the importance of the right to answer unfavorable evidence. Mr. Justice Black said: "It means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor."—73 S. Ct. at page 632.

That is exactly what has happened here. The evidence used against the respondents has been judged by the Department of Justice, the prosecutor. Neither the appeal board nor the court has ever had an opportunity to appraise the evidence appearing in the F.B.I. report, which has been withheld by the prosecutor. Mr. Justice Frankfurter, concurred in the opinion by Mr. Justice Jackson, which said in footnote 9: "... If they are not allowed to be present, it is hard to see how it would answer the purpose of testing the Government's case by cross-examination or counter-evidence, which is what a hearing is for. The questions raised by the proposal need not be discussed since they do not call for decision here."—73 S. Ct. at page 631.

The Government states that the reason Congress provided for a hearing in the Department of Justice was to enable the registrant by his "statements and demeanor to demonstrate sincerity". The Government apparently does not consider a hearing for the purpose of rebutting unfavorable evidence. This is a novel interpretation of "hearing". This alien suggestion ought not to be grafted on to due process of law in administrative proceedings.

The hearing officer reaches his conclusion not alone by observation and discussion. He also bases his judgment upon the F.B.I. report. His opinion of the registrant's sincerity and the basis of his objections are never limited to observation. They always include each item and document available to him. One of the most important documents at his hands and used by him is the secret F.B.I. report. This report should, therefore, be made a part of the draft board file. It should be available to the registrant. It is not. This was a violation of the plain intent of Congress.

The Director of Selective Service has emphasized to the entire Selective Service System in an article entitled, "Tolerance Is Faith in Human Rights," the point that observation alone is insufficient. He said:

"The basic difficulty lies in the absence of any accepted methods by which the beliefs and the sincerity of regis-

trants may be tested. The attempt to judge these attributes by what the registrants have done or have said permits a large area of error. Observation of a registrant is far from constant and witnesses are other human beings. These witnesses, moreover, are often prejudiced in favor, if friendly, and contrariwise, if unfriendly. Their membership in a more standardized religious organization often adds, rather than detracts, from the exercise of tolerance to bring unusual methods in the exercise of the right to worship." (*Selective Service*, Washington, Vol. I, No. 12, December 1951.) This is the monthly bulletin of the National Headquarters of the Selective Service System.

The fact that the evidence may have been favorable to Packer does not excuse the withholding of it from the appeal board. It was the obligation of the appeal board to make a fair and just determination. The withholding of the facts favorable to Packer injured him because the appeal board rejected the favorable evidence and denied his claim for classification as a conscientious objector to noncombatant service, on account of its inability to get the facts. Packer also has some rights along with the appeal board under the act. Congress intended that he should be fairly and justly classified. If there was evidence favorable or unfavorable to Packer, it was the duty of the Department of Justice to supply it to the administrative agency. It was for the appeal board to finally determine the claim. The appeal board's being completely in the dark and treated like an outcast by the Department of Justice in the refusal to produce the facts certainly produced injury and an unfair classification of Packer.

If it is unethical to withhold *unfavorable* evidence from the registrant, then it is all the more wrong for the Department of Justice to hold back *favorable* evidence from the appeal board. The purpose of Congress will be defeated if all or any of the facts of the investigation are withheld from the appeal board. No complaint whatever could be made about outside evidence not being placed in

the file if it were not for the fact that Congress provided for the investigation and inquiry by the F.B.I. Since Congress hired the Department of Justice to work for the appeal board in producing all of the facts on the conscientious objector claim, then it is the unequivocal duty of the Department of Justice to complete the job and deliver the goods; the report of the F.B.I.

The rights of respondents, incidental to the appropriate inquiry by the Department of Justice under the act, are not confined to seeing and answering *unfavorable* evidence. Since the act provided that the Department of Justice should turn up all of the facts to the appeal board, whether they were favorable or unfavorable, it was necessary that the report be made a part of the file.

Unless and until the report was put in the file, the procedure contemplated by Congress was not completed. Under the act and regulations Packer was entitled to have all of the favorable evidence placed in the file, as much as he would have the right to be confronted with and answer any unfavorable evidence. The record was not complete since the Department of Justice deliberately tore out of the record a great part of the case. It was a gaping hole that vitiated the entire administrative process.

All of the statements produced by Packer in the file were undisputed. These facts were all favorable to his claim. If the investigation developed no derogatory facts apparently all the evidence developed by the department in the process of the investigation and appropriate inquiry was also favorable. They corroborated Packer's claim. The very fact that the determination ultimately made by the appeal board was arbitrary and capricious proves that it was the duty of the Department of Justice to supply the appeal board with the F.B.I. report. Had the report been furnished to it Packer may never have been denied his claim for classification as a conscientious objector to noncombatant service.

The fact that respondents have the burden of sustaining

their claims does not in any way excuse the Department of Justice from doing its job. If Congress intended to excuse the Department of Justice from investigating and conducting an appropriate inquiry solely because the conscientious objector had the burden of sustaining his claim, then Congress would have said so. It is the appeal board that was entitled to the information withheld from it. The withholding of the F.B.I. report harmed the appeal board. The harm suffered by the appeal board, in turn, injured respondents. Their entire cases were jaundiced by the arbitrary refusal to turn over the records of the investigation and appropriate inquiry by the Department of Justice to the appeal board. Whether the facts corroborated respondents' claim or not is immaterial. It was the refusal to supply the report to the administrative agency that defeated respondents' claims as conscientious objectors to noncombatant service.

It is the Government's contention that the burden of proof is on the registrant to establish his claim of conscientious objection. That is all the more reason why all of the evidence should be revealed. The one who has the burden of proof should be furnished with all of the necessary evidence to enable him to make that proof.

The Government seeks to have the registrant prove his claim to conscientious objection upon evidence which is not disclosed to him. This evidence may be false and often is. Under such circumstances it is impossible for the registrant to bolster his claim or rebut such false evidence because the party who gave it is unknown to him. Unknown evidence can never be rebutted. Unknown witnesses can never be impeached or contradicted.

The Government argues that, because the hearing is characterized by the Department of Justice as "summary and informal procedures" in its notice sent to registrants, it is not necessary to reveal the evidence. This is a new technique in government. Congress did not describe the hearing as "summary and informal". The use of names and

epithets cannot be employed to defeat a right. Even if the hearing were summary, it is necessary to be fair. Suppose it is informal, it is necessary to confront the parties with adverse evidence. The cliché "summary and informal procedures" should not be permitted to mislead the Court. This does not authorize an unfair hearing. It does not authorize deprivation of procedural due process. It does not open the gates to police-state procedure. It amends the act of Congress.

The Department of Justice cannot, by instructions sent to registrants and through orders of the Attorney General, change the type of hearing contemplated by Congress. Irrespective of how summary and informal the procedure may be, it was intended that registrants know the evidence to be relied on by the administrative agency.

The language of the Court in *Londoner v. City and County of Denver*, 210 U. S. 373, applies. In that case the Court said that even though a hearing may be informal, the hearing "in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal".—210 U. S. 373, at page 386.

It should be remembered that the proceedings before the draft boards are also "summary and informal procedures". The president, however, does not claim for the draft boards under the term "summary and informal procedures" the broad powers claimed and arrogated to itself by the Department of Justice. The president has required that all evidence relied on by the draft boards be reduced to writing and placed in the file.—See Sections 1606.32, 1621.8, 1624.2 (b) of the regulations.

It is said that if the F.B.I. report is produced it will mean a full-scale trial before the hearing officer. This does not mean that. While the hearing officer might have the right to subpoena witnesses, if authorized by the Department of Justice, the very least that the disclosure of the F.B.I. report would mean is the right of the registrant to

answer the adverse evidence and not cross-examine witnesses. If he cannot answer the evidence, then the proceeding is worse than no hearing at all.

The statement of dangers and trouble that the Government conjures up about the impeding of the draft law is merely to scare the Court. The word "trial" ought not to sway the Court into believing that a judicial trial will result from a disclosure of the F.B.I. report. There are ways in which the administrator might prevent the slowing up of the draft law or prolix proceedings or a "trial". All that is required by due process is that the evidence be made known and that a full and fair hearing be given. When the registrant has had the right to answer this, together with a full and fair hearing, it would be enough. It is not necessary to have a full formal judicial trial.

Petitioner emphasizes the fact that Congress did not intend to provide a "trial" in its judicial sense. Whether the investigation and hearing be termed a trial or a proceeding is immaterial. There is one thing certain: even though a trial was not intended, secretive evidence also was not intended to be used at the hearing.

The Court, therefore, should not be persuaded by the arguments of the Government on expediency and practicality. The draft law will not be defeated by compliance with the requirements of due process of law. There is a vast difference between giving a person notice of adverse evidence in an administrative proceeding and a judicial trial. The opportunity to rebut adverse evidence does not necessarily mean a judicial trial.

The Government states that the hearing officer has no subpoena powers. Certainly the Government does not mean to say the Department of Justice is rendered so helpless as to have no subpoena powers. Ordinarily in criminal investigation it has no subpoena powers. This is not a criminal investigation. Congress provided for a hearing. A hearing means that the tribunal conducting the hearing has subpoena powers if it chooses to exercise them. Apparently

the Department of Justice in exercising its commission from Congress has neglected to invoke the subpoena powers. Their failure to call up the subpoena powers does not mean to say that the hearing officer does not have it available if the department wanted to give it to him.

The quasi-judicial character of the procedure pervades both the draft board and the Department of Justice in the process of investigation, recommendation and classification of conscientious objector claims. That no subpoena power is conferred upon the hearing officer is said to prove that the proceedings are not quasi-judicial. This is no proof, though. The Department of Justice has subpoena power, if it chooses to exercise it. The act did not strip the department of its subpoena power. If the Attorney General wanted to do so, he could provide for the subpoena of witnesses. This he could do under the provision "appropriate investigation", as well as "hearing". Investigation and hearing both carry with them the right to hear witnesses. The right to hear witnesses means the right to call them. The right to call them spells the power to subpoena.

Even if it were to be concluded that there was no subpoena power, the Government is not right. No subpoena power still does not mean that the Department of Justice is free to stoop to police-state practices in the conducting of conscientious objector hearings. A modicum due process demands the revelation of the F.B.I. report.

It is said that the word "hearing" used by Congress did not mean the taking of testimony before a quasi-judicial administrative body with no power to decide the registrant's claim. It is true that the Department of Justice has no power to decide the claim. It is wrong to say that the hearing officer does not perform a quasi-judicial administrative function. Courts have held that the functions of the Selective Service System are quasi-judicial.—*Gibson v. Reynolds*, 172 F. 2d 95 (8th Cir.); *Dodez v. Weygandt*, 173 F. 2d 965 (6th Cir.).

Since the draft boards have been held to be quasi-judicial, then the proceedings by another arm of the Government, the Department of Justice (co-operating with the draft boards under the act), are also quasi-judicial.

The mere fact that the hearing leads to a recommendation to the draft board does not change the nature of the procedure from quasi-judicial to a mere general "inquiry" as contended by the Government.

Even Assistant Attorney General Joseph C. Duggan wrote that the hearing officer was "a quasi-judicial officer". — *The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service*, p. 114, Washington, Catholic University of America Press, 1946.

There is a statement in the Government's brief that the F.B.I. report furnishes the hearing officer with crucial leads for questioning the registrant and his witnesses. It further says that this information would not be available if the names or sources were disclosed. If these leads are as crucial as the Government contends, are they not as crucial for the registrant who is seeking to be classified? What is good for the Government is good for the registrant. Why the inequality?

The Government in an indirect way would try to lead the Court to the conclusion that the main thing intended by Congress was the "inquiry". It would have the Court believe that the "hearing" is altogether incidental and inconsequential. Had Congress intended to minimize the hearing, it would have said so. It used the word "inquiry"; then this is followed by the word "hearing". "Inquiry" means what it says. "Hearing" also has a well-understood meaning. "Hearing" comes after "inquiry". Had the hearing been incidental to inquiry, Congress would have provided for the hearing first and then the inquiry.

The very purpose of the inquiry is to develop the facts for the hearing. The hearing is the crux of the matter. It is the ultimate goal of evaluating the evidence covered in the investigation. It is the most important part of the entire

procedure in the Department of Justice. Upon this the hearing officer and the Department of Justice base their recommendations. There cannot be a recommendation until there has been a hearing.

Congress certainly did not intend to treat the procedure in the Department of Justice solely as an investigative and reporting function without a hearing. Congress did not intend to limit it to appropriate inquiry. The procedure explicitly included hearing. Hearing requires findings. A hearing commands a disclosure of the evidence. All evidence, not part of the evidence, must be turned up, lest the findings be illegal.

The Government has put the cart before the horse in insinuating to this Court that the hearing provided for is only incidental to the inquiry. The suggestion therefore ought to be rejected.

The Government tries to stampede the Court with *Williams v. New York*, 337 U.S. 241. That case involved the right of the judge to conceal confidential evidence about a murderer on a pre-sentence investigation. The defendant in the case was a gangster. He was given the death sentence on the undisclosed information in the pre-sentence investigation. Where the court has to deal with one who has accessories and friendly hardened criminals, it is often necessary to protect the informants against reprisal. In such a situation, there is every reason for the nondisclosure. Protecting the informant, protects his life, perhaps. A revelation of the name of the informant may spell death to him.

No such danger or any possibility of reprisal exists to the informants providing evidence adverse to conscientious objectors. There is no greater danger to an informant in a conscientious objector case than there would be in any other administrative law proceeding such as proceedings involving labor relations, rate making and deportation cases. What is there so dangerous about a conscientious objector

that puts informants testifying about him in the same category as informants whose names appear in a pre-sentence investigation in murder cases? There is no similarity between the two. The whitewashing of *Williams v. New York*, 337 U. S. 241, to assimilate it here has no place in this case. The holding should be put aside.

Another strong reason exists why the holding in *Williams v. New York*, 337 U. S. 241, is inappropriate. That case dealt with a subject matter clearly different from a determination. The trial had been held. The guilt of the defendant had already been fixed. The matter of judgment and sentence was something entirely in the discrimination of the judge. The sentencing of a defendant in a criminal case is an act of executing judgment. It involves an exercise of broad discretion on the part of the trial judge. He can consider matters that are inadmissible at the trial. He can hear pleas in mitigation. He can go into the entire background and life of the defendant. The hearing at a sentence and the consideration of the pre-sentence investigation are matters entirely in the discrimination of the judge. It is different from the trial procedure.

Had the withholding of the information in the pre-sentence investigation in the *Williams* case been evidence which the court considered at the trial and were such evidence considered in camera and not divulged to the defendant, then an entirely different situation would have been presented. No court would let a judgment stand where secret evidence had been considered by the court in arriving at a finding of guilt.

The inquiry and hearing conducted by the Department of Justice were for the purpose of turning up evidence to the appeal board to make the determination of whether or not the benefits granted to the conscientious objector status shall or shall not be granted to the particular registrant. It involves a determination of justice, just like a finding of guilt or innocence involves a determination of

justice. The situation here is analogous to the secret consideration of evidence withheld at a trial. It is not at all like the consideration of the pre-sentence investigation report.

Another strong reason, therefore, exists why the *Williams* case is out of place in this case. It is that the extent of punishment assessed is never a question for the appellate courts as long as it is within the law. When a sentence imposed is within the law, it can never be questioned. Anything relating to the punishment (within the law) is entirely immaterial and may not be considered.

The investigation of conscientious objector claims by the Department of Justice is not a part of the criminal investigation process by the department. Mr. Joseph C. Duggan, former Assistant Attorney General in charge of the division in the department conducting the investigations, said that the investigations were "by a division in the Department separate and distinct from that charged with enforcement of the penal sanctions of the Act". *The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service*, Washington, Catholic University of America Press, 1946, page 113, footnote 111. It is plain that the investigation, therefore, is not of a criminal type. The informants, accordingly, are not criminal informants.

Bailey v. Richardson, 182 F. 2d 46 (D. C. Cir.) affirmed 341 U. S. 918, relied on by the Government is not in point. The case involved a government employee. She was subject to discharge by the government without consideration, reason or notice. The points of distinction between the cases (and *Bailey v. Richardson*, supra) are: (1) there was no provision for a hearing made in the case, (2) there was no question of personal liberty involved and there was no chance of a jail sentence, and (3) the information dealt with in the *Bailey* case concerned security information. There is, accordingly, not the slightest similarity between the *Bailey* case and this case. It is distinguishable. It should

be put aside as having no bearing on the question involved.

Escoe v. Zerbst, 295 U. S. 490, is in point. It did not involve a determination. The only point for consideration was the revocation of probation. The Court held that probation was an act of grace. It said that it could be coupled with such conditions as Congress may impose. The Government argued that the District judge who revoked probation under the statute without notice was within his rights. The Court said:

"But the power of the lawmakers to dispense with notice or a hearing as part of the procedure of probation does not mean that a like dispensing power, in opposition to the will of Congress, has been confided to the courts. The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. If the statement of the Congress that the probationer shall be brought before the court is command and not advice, it defines and conditions power. (*French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702) The revocation is invalid unless the command has been obeyed.

"... We hold that the attempted revocation is invalid for defect of power, and that, the suspension still continuing, the petitioner is entitled to be discharged from his confinement."

The *Nugent* and *Packer* cases are closer to the *Joint Anti-Fascist Refugee Committee* case (341 U. S. 123) than they are to the *Norwegian Nitrogen* case (288 U. S. 294). In the *Joint Anti-Fascist Refugee Committee* case there was involved an executive order that provided only for an investigation and appropriate determination. There was no requirement of a hearing. The procedure was not prescribed by the statute as here. It was devised by the president under Executive Order 9835. Even in the absence of a statutory provision for hearing, the Court held that it was unlawful to withhold the secret investigative report.

The Government's brief attempts to assimilate the case

at bar with the *Norwegian Nitrogen* case. (288 U. S. 294) It contends that the hearing results only in a recommendation in both cases. However, the recommendation of a hearing officer in a selective service classification proceeding may involve the registrant in a criminal proceeding and cause his conviction. That makes the difference between the case at bar and the *Norwegian Nitrogen* case, *supra*. In the *Norwegian Nitrogen* case the evidence was merely for the information of the president in fixing tariff rates. He could accept or reject such evidence and fix whatever tariff rates appear proper in his discretion. No one may complain regardless of how strong the evidence may be against the recommendation. This is not so in a selective service classification proceeding. The appeal board cannot make a classification "in the teeth of the evidence".

There is a vast distinction between the case at bar and that cited by the Government in the case of *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294. The *Norwegian Nitrogen* case dealt with a determination made by the United States Tariff Commission fixing a new rate of duty. The commission was performing a legislative function. It was not performing a quasi-judicial function like that of the Selective Service System in the classification of registrants. It was contended that the commission failed to give the company a hearing required by the statute. The company was seeking to get evidence in the proceeding by the commission which would have disclosed trade secrets of its competitor. The disclosure of the trade secrets would have caused serious harm to that competitor.

While the evidence not disclosed had a direct relation to the tariff to be fixed, it did not directly pertain to the company. It pertained to all companies. However, the confidential record made by the F.B.I. upon investigation by the Department of Justice deals directly with the registrant, affects the classification of the registrant and may be sufficient to cause his conviction in a criminal case. The

registrant alone is, therefore, most vitally affected by the evidence contained in the F.B.I. report.

The hearing provided for in the Department of Justice to determine the conscientious objector status of the registrant is one that is provided by both the statute and the regulations. The Court approved the procedure followed in the *Norwegian Nitrogen* case because the hearing was not one that could be "demanded as of right".—288 U. S. 294, 304.

Another difference appears in the *Norwegian Nitrogen* case. This factor does not exist here. It was that the change of tariff laws was purely legislative and "not subject to impeachment on the score of invalidity, though notice to those affected has been omitted altogether".—288 U. S. 294, 304.

The classification procedure in a selective service case is, however, fixed by statute. It is something that is subject to judicial review. The validity of the classification depends on whether due process of law has been accorded. There is a vast difference therefore between selective service proceedings and legislative proceedings to fix the tariff. This vital distinction casts the *Norwegian Nitrogen* case to the side.

The hearing that was provided for was said by the Court in the *Norwegian Nitrogen* case to be one "adapted to the consequences that are to follow". (288 U. S. at page 319) The consequences that followed the hearing merely affected tariff. It pertained to a legislative function. It in no sense of the word encroached upon personal liberties. The tariff determination did not affect the freedom of the individual.

It should be remembered that we are dealing here with a question of personal liberty. Property rights are not the subject of the administrative determination. In administrative determinations involving personal liberty there is a

fundamental rule of law that there must be due process of law.—See *Ng Fung Ho v. White*, 259 U. S. 276.

In that case the deportation of a resident claiming to be a citizen was involved. The Court held that the Fifth Amendment entitled such person seeking personal liberty to due process and a full and fair hearing. It is significant to note the comment of Mr. Justice Brandeis. He said that deportation deprives of liberty and “may result also in loss of property and life, or all that makes life worth living”.—259 U. S. at page 284; see also *Kwong Hai Chew v. Colding*, 344 U. S. 590.

Mr. Justice Brandeis again emphasized the requirement of due process of law and a full and fair hearing in personal liberty cases where it may not be granted in property-rights cases. This was in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38.—See his remarks at page 77.

A wide gulf exists between administrative determinations that are quasi-judicial and determinations made by the tariff commission in the exercise of its legislative functions. The gulf is too broad to be spanned here. The Government has failed to bridge the gap. These cases cannot be pushed into a category different from that which the law makes for them. They are as different from the *Norwegian Nitrogen* case as is day from night. The distinction between performance of the legislative function and the making of a quasi-judicial determination in an administrative agency is obvious. This difference saves this case from the fate of the *Norwegian Nitrogen* case.

Another distinction between the *Norwegian Nitrogen* case (288 U. S. 294) and this one is to be found in the opinion in that case. The opinion points out that that feature of the legislative hearing objected to was a hearing that was made “in the development of the process of legislation”. The Court quickly added that another section of the tariff law prescribed “the remedy available to an importer after the legislative process had been completed, and the question

is whether the merchandise has been properly appraised". The Court then proceeds to outline the remedy available. The remedy was a hearing subsequent to the order fixing the tariff. This remedy had never been resorted to. What the Court had before it was not an administrative proceeding but a legislative hearing. This vital difference was pointed out in the opinion. The Court said, after reviewing the administrative parts of the act, that this "is the way that Congress spoke when it wished to attach to an administrative proceeding the incidence of a trial in court".—288 U. S. at page 316.

Another thing to be kept in mind about the *Norwegian Nitrogen* case (288 U. S. 294) is that the Court had before it a legislative hearing solely on tariffs. This had been explicitly established by the Congress. Congress did not leave the word "hearing" to be applied in its broad general sense as it is used here. Congress in that case (which it did not do here) specifically prescribed the type of hearing. The Court said: "We are not unmindful of cases in which the word 'hearing' as applied to administrative proceedings has been thought to have a broader meaning. All depends upon the context. There is no denial of the power of Congress to lay bare to the business rivals of a producer and indeed to the public generally every document in the office of this Commission and all the information collected by its agents. The question for us here is whether there was the will to go so far. The answer will not be found in definitions of a hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen. To know what they are, there must be recourse to all the aids available in the process of construction, to history and analogy, and practice as well as to the dictionary. . . . Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights

in a very different way from the report of a commission which merely investigates and advises. The traditional forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the president may be accepted, modified, or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the president in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed. It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. They may be challenged in the courts if the effect is to reduce the charges to the point of confiscation. (*Smyth v. Ames*, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819) They may be challenged for other reasons when they are without evidence supporting them, and are merely arbitrary edicts."—288 U. S. 299, at pages 317, 318.

It is true that what we have here is a report or recommendation that may be "accepted, modified, or rejected". It happens that the recommendation was accepted. It happens also, as the Court said in the quotation above, to do the opposite. It happens to "bear fruit" and "trenches upon legal rights". Herein lies another distinction that exists between the *Norwegian Nitrogen* case (288 U. S. 294) relied on by the Government and this case. The Court in the *Norwegian Nitrogen* case said that in different situations the action may be challenged in the courts. This case is "very different, however" and "may be challenged in the courts".

Another difference is between the exercise of the legislative function in the *Norwegian Nitrogen* case and the performance of the administrative function here. There the Government could fix a new tariff rate in spite of any

contrary evidence. In a draft classification proceeding the appeal board can under no circumstances classify a registrant in disregard of the evidence. The powers of the government in the two situations are entirely different. This difference also pushes the *Norwegian Nitrogen* case to the side. It is inapplicable here.

The Government in footnote 5 states that Nugent "made no further efforts to prepare for the hearing". How could he? There was nothing that he knew of an adverse nature for which to prepare. He went to the office of the hearing officer; not finding him, he was told by the secretary that the F.B.I. report was favorable. At the trial Nugent testified that the "secretary informed me when I told her of this, that the FBI files were favorable and that I should have no difficulty in receiving my desired classification. And Mr. Gallagher's secretary also asked me if I were going to bring anyone as an advisor, which is stipulated in that paper I submitted to you, your Honor, and I informed her since the FBI records were favorable, I saw no need of it."

"She said, 'That is right, because I feel you should have no trouble in receiving your desired classification because of the good recommendation from the FBI. I thought no advisor would be necessary. It was merely a routine matter.'"

"She said, 'You should have no trouble in receiving your classification.' " [N 10, 11]

It is obvious from this testimony that Nugent did all that he could do. He prepared the best possible.

The Government states that Nugent "was given an opportunity again to state the grounds of his conscientious objection". This statement by the Government does not tell the whole story. He was given only a very little opportunity. His opportunity was restricted by the hearing officer who struck out his evidence. The hearing officer restricted his proof and denied him the right to say everything he wanted to say. [N 12, 13]

The Government says again and again that there was no development of derogatory information at the hearings. How could there be such development? It was the duty of the hearing officer to call the unfavorable evidence to the attention of the registrant. He did not do it in either case. The unfavorable evidence was, however, relied upon. The conscientious objector status was denied because of the derogatory evidence which must have been in the report in each case. Neither registrant had notice of any adverse evidence. Therefore it was impossible for them to raise or discuss it at the hearing.

The Government emphasizes that in neither case was the report requested. While Packer complied with the instructions and asked for "the general nature and character" of unfavorable evidence, Nugent did not. Neither could have obtained, however, the F.B.I. report since it would not have been given to them. It would have been futile to ask for it. The departmental regulations forbade the disclosure of the F.B.I. report. The instructions mailed to the registrant confirmed the regulations forbidding the disclosure of the F.B.I. report. These instructions told the registrant that he could not raise any objection "concerning any evidence or any phase of the proceedings".

The Government argues this point as though respondents were lawyers. They were not trained or skilled in law. Like any other registrant, they were unlearned in the law. Respondents had the right to rely upon, and have confidence in, the hearing officer. The hearing officer in each case was a lawyer. In each case he knew that each respondent was ignorant of the law. The respondent was at a distinct disadvantage to cope with the hearing officer in each case.

There was a relationship of trust and confidence between each respondent and hearing officer and each respondent could rely in that trust. The relationship of trust and con-

fidence placed a high responsibility on the hearing officer to be fair. He was not.

He had a duty to make sure there was nothing withheld that should have been made known. He had the responsibility not to rely upon grounds that were not discussed with the registrant. This point is well emphasized by statement made by counsel in the trial court in the *Nugent* case. Concerning the registrant he said that "he is not expected to know all the intricacies of the Selective Service law, nor be thinking all the time what he should do".

The present act and the regulations must be construed more favorably to the registrant than was the 1940 act. The Selective Service Act of 1948 is not backed by a dire emergency as was the Selective Training and Service Act of 1940. Former Attorney General McGranery, when sitting as District Judge for the Eastern District of Pennsylvania, so held in *Ex parte Fabiani*, 105 F. Supp. 139. He discussed extensively the distinction between the two acts. He held that the present act and the regulations must be generously construed in favor of the registrant and strictly enforced against the draft boards. He said that the "purpose of the 1948 and 1951 Acts, to the contrary, is merely to achieve and maintain sufficient armed strength to deter aggression; it is not to prepare for war".

There is no element of national security or national defense secrets involved in investigating the private life of a religious objector to war that commands a sealing of the records. The department admits they must give notice of adverse evidence in the F.B.I. report. If a summary or the substance were all that the Department of Justice had or used, then no more could be demanded. But the Department

of Justice has the best evidence and uses the best evidence in making the recommendation that results in the ultimate determination. It is not willing to supply even secondary evidence. It chooses to decide for itself and censor the original or best evidence and deny the registrant the use of secondary evidence.

A more unfair and unjust method of selection and classification of registrants cannot be imagined. Congress has decreed fair treatment. The Department of Justice has repealed the act. It has set up its own standards for hearings. Not only does it flout Congress, it now defies the courts and the Constitution all of us are sworn to uphold and defend. For what reason is this done? Congress supplies no basis for it. What reason can the Department of Justice give that finds support in the legislation or its history? None! Surely Order No. 3229 and 5 U. S. C. 22 (R. S. 161) do not command a denial of a fair hearing. That order and that statute have been held time and again to be subject to the demands of a full and fair hearing. They have been made to yield to fair play. The privilege is waived when the F.B.I. report is used as here.

Respondents submit that in consideration of the foregoing legislative history it is plain that Congress intended that a full and fair hearing should be given to the registrant by the Department of Justice as well as by the Selective Service System. This policy of fairness at the hearings makes necessary the inclusion of all evidence relied upon. The direct evidence itself must be produced and made part of the record. It is not within the province of the agency to censor the direct evidence or withhold it and hand up a conclusion or summary of the direct evidence. The F.B.I. reports must be made a part of the selective service files.

B. *The weight of authority in the decisions in point that deal with departmental Order No. 3229, forbidding disclosure of the confidential records, holds that the privilege of the F.B.I. must yield where the secret evidence is relied upon in reaching the determination.*

The first decision rendered on this precise point was in *United States v. Oller, Donovan and Pekarski*, 107 F. Supp. 54 (D. Conn. July 28, 1952). Judge Smith held that the failure to make a disclosure of the secret investigative police report constituted a deprivation of the rights of the registrant to procedural due process of law. It appeared from the record and the Government contended that the substance of the adverse evidence was given to the registrant and the failure to produce the report at the hearing by the hearing officer was harmless error. The court said, "In the absence of the F.B.I. reports, the Court cannot be certain." He ordered acquittal of Oller and Donovan. The failure to produce the report in the case of Pekarski was found to be harmless because the hearing officer reported favorably to the Department of Justice, which recommended to the appeal board granting of the conscientious objector claim made by Pekarski. The appeal board rejected the recommendation in part, giving Pekarski the noncombatant military service classification as conscientious objector.

The second decision holding that it was the duty of the Department of Justice to produce the F.B.I. report at the hearing, even when not requested, was *United States v. Geyer*, 108 F. Supp. 70 (D. Conn., Oct. 10, 1952). Judge Hincks held in that case that the congressional provision for a fair and just selection and classification of registrants required that the F.B.I. statement be made available to the registrant at the hearing. He also shows that the provision for a hearing following the investigation by the F.B.I. was not for the purpose of the registrant's giving additional evidence to supplement the report but that he might have the opportunity to answer and rebut the un-

favorable evidence in the report. Judge Hincks specifically held that the legislative intent implied from the procedure mentioned was to make the F.B.I. report a part of the records of the draft board on the registrant's case. Also, he shows that the departmental recommendation on the claim to the appeal board could not be properly evaluated by the appeal board without the entire report's being made a part of the record. He then holds that the giving of notice of hearing to the registrant implies the production of the F.B.I. report and the making of it a part of the file. Judge Hincks also holds that the provisions in the act and regulations giving the appeal board the right to reject the recommendation implies the right of the board to see the F.B.I. report so that the right can be properly exercised. Finally, he added that he agreed with Judge Smith in *United States v. Oller, supra*, that the failure to produce the F.B.I. report at the hearing and make it a part of the draft board records constituted a denial of procedural due process of law.

In *United States v. Nugent*, 200 F. 2d 46 (November 10, 1952), the failure to produce the F.B.I. report or a summary thereof at the hearing was conclusively held by the Second Circuit to be harmful because of the failure and refusal of the Government to produce it under proper subpoena and demand at the trial.

This same ruling was followed by the court below in the *Packer* case. The court said, among other things:

"At the hearing before the Hearing Officer of the Department of Justice the defendant was denied the right to see the F.B.I. report on which the eventual recommendation of the Department of Justice to the Appeal Board that the defendant's claim as a conscientious objector be denied was in part based. In *United States v. Nugent* (November 10, 1952), (2d Cir.), 200 F. 2d 46, we held such a denial to be reversible error. It is true that in the case at bar the defendant was told that the F.B.I. report was altogether favorable to him. But the correctness of such a representa-

tion was in our opinion a matter which the defendant was entitled to judge for himself by seeing the original F.B.I. record."

In the *Packer* case a subpoena issued for the production of the F.B.I. report at the trial. The subpoena was ordered quashed by the trial court. In the *Nugent* case the court of appeals held that the Government must take the consequences of an unfavorable conclusion that the F.B.I. report was against the Government. In the *Packer* case the court of appeals reaffirmed the holding in the *Nugent* case. In the *Nugent* case the court below adopted the reasoning of Judge Hincks in *United States v. Geyer*, 108 F. Supp. 70. It was then held that, even though the defendant did not demand the F.B.I. report to be produced at the hearing or ask for the general nature of the adverse evidence as warned in the written notice from the hearing officer, still it was a violation of the act not to make the report available to him at the hearing. The court held that the report had to be made a part of the files.

In *United States v. Bouziden*, 108 F. Supp. 395 (D.C. W. D. Oklahoma, November 13, 1952), it was held that the registrant was not entitled to have the F.B.I. report produced at the hearing. This holding, contrary to the *Nugent* decision, *supra*, on this point, is based on the proposition that the draft board proceedings are not judicial, that the conscientious objector status is one that rests exclusively for the draft boards to determine, and there was no constitutional exemption. The court, however, held that the failure of the hearing officer to call the registrant's attention to the substance of the adverse evidence constituted a deprivation of the rights of the registrant. It was said:

"As directed by the statute the Department of Justice made an appropriate inquiry. Then the hearing was held with the registrant for the purpose of determining the character and good faith of the objections of the registrant to his classification. The undisputed evidence is that no

mention was ever made by the hearing officer of the unfavorable information contained in the Federal Bureau of Investigation report. No opportunity was given to rebut this unfavorable information. . . .

" . . . The hearing officer must not be permitted to withhold unfavorable information gained during the inquiry, and giving no opportunity to rebut at the hearing, then use this same unfavorable information as a basis for his adverse advisory recommendation. If this is done the hearing itself becomes a sham and a farce. Why hold a hearing to determine a fact if there is a predetermination of the fact and no intent to discuss the basis of the predetermination?"

The court in *United States v. Bouziden*, 108 F. Supp. 395 (D. C. Okla. W. D. 1952), distinguished the decision in *Imboden v. United States*, 194 F. 2d 508 (6th Cir.), certiorari denied 343 U. S. 957, on the ground that the hearing officer provided the registrant in that case with the substance of the unfavorable evidence and that no complaint was made about the failure to answer but that the contention was made that he did not give the names of the informants to the registrant.—Compare *United States v. Annett*, 108 F. Supp. 400 (D. C. Okla. W. D. 1952).

Judge Smith in *United States v. Christiano*, Cr. No. 8644, District of Connecticut, November 17, 1952, followed the *Nugent* decision, *supra*. Among other things he said:

"Since the investigative report resulting from the inquiry of the Department of Justice was not made a part of the record for consideration by all directly concerned with the classification, the classification must be held invalid and a judgment of acquittal entered."

Elder v. United States, (No. 13,405, Ninth Circuit, February 24, 1953) directly conflicts with the conclusion reached by the court below in the *Nugent* and *Packer* decisions. This decision is similar to that reached by the district court in *United States v. Bouziden*, 108 F. Supp.

395, and *United States v. Annett*, 108 F. Supp. 400. The district court held that the procedure followed by the Department of Justice in giving the registrant a summary of that part of the F.B.I. report considered to be unfavorable was sufficient. The court of appeals in the *Elder* case imputes to Congress the intention of conducting an investigation similar to that of a criminal investigation. The fallacy of the holding of the court of appeals in the *Elder* case is demonstrated in other parts of this brief in discussing the contentions raised by the Government in this case.

The position of the court of appeals in the *Elder* case and that of the Government here are identical. It is unnecessary to repeat the arguments made elsewhere in this brief that expose the error in the *Elder* decision. The *Elder* decision stands or falls with the Government's argument here.

There is one outstanding distinction between the facts in the *Elder* case and in these cases. In the *Elder* case (see note 4) the court held that the hearing officer stated the substance of the F.B.I. report and that the memorandum of such substance was placed in the file. There is no such summary of the F.B.I. report in either of these cases. If there were such a summary, however, still it would be inadequate. There would be no compliance with the act, the regulations or the requirements of due process.

While the decision of Judge Hincks in *United States v. Geyer*, 108 F. Supp. 70, conflicts with that of Judge Wallace in *United States v. Bouziden*, 108 F. Supp. 395, it agrees on the distinction of the decision in *Imboden v. United States*, 194 F. 2d 508 (6th Cir.). The same distinction is made by both judges.

The *Imboden* opinion ought to be distinguished here. If it may not be distinguished then it is certainly unsound. The fallacy of that opinion will now be demonstrated.

The denial of certiorari in the *Imboden* case, *supra*, does

not import an approval of the holding in any event. Certiorari is granted only in cases of great public importance. Error alone is not sufficient to get the writ, even when egregious. Being a discretionary remedy the Court has, on scores of occasions, warned the bar and lower courts that the denials of writs do not mean that the Court affirms the judgments or approves the reasons stated by lower courts in their opinions. (See *Sunal v. Large*, 332 U. S. 174, 181, and *House v. Mayo*, 324 U. S. 42, 48.) Compare the remarks of Mr. Justice Frankfurter, dissenting, in *Darr v. Burford*, 339 U. S. 200, 227.

The *Imboden* holding, *supra*, must be confined to the point raised. It cannot be said that the court in that case decided it was not a violation of the law to use the hearsay evidence, make no record of it and deny the registrant the right to be notified of the unfavorable evidence to be relied upon. Such point was not raised in the *Imboden* case; it was not decided.

It must be remembered that the Court of Appeals for the Sixth Circuit in the *Imboden* case did not have pressed upon it the statutory construction urged here. The court did not consider the legislative history that demonstrated an intent on the part of Congress to be fair to the registrant in the classification and selection. Had that court considered the legislative history perhaps a different result would have been reached.

That the *Imboden* holding, *supra*, does not reach the question involved here is proved by the above holdings in *United States v. Oller*, 107 F. Supp. 54; *United States v. Geyer*, 108 F. Supp. 70; and the *Tacker* case, below. The courts in these cases held that the use of the F.B.I. secret report and reliance upon the hearsay evidence in it without giving the registrant, fully and completely, the F.B.I. report or a full copy of the evidence relied upon which was adverse constituted a denial of procedural due process of law.

It can be clearly seen that there is a distinction between the *Oller*, *Geyer* and *Nugent* cases from the *Imboden* case, *supra*. The *Imboden* case did not decide the point raised in those cases or in this case, that the withholding of the F.B.I. report and the failure of the hearing officer to notify the registrant of all of the unfavorable evidence relied upon constitutes a denial of procedural due process of law. There is a vast difference between withholding the name of the informant and using adverse evidence and not giving the registrant notice thereof, which is the case here.

In the *Imboden* opinion the appears an outstanding distinction from the cases here. The court stated that the F.B.I. report went into the file. It is this failure to show the F.B.I. report to *Nugent* and *Packer* that is the gist of this point. The thing that is complained of as not being done here was done in the *Imboden* case. The only assertion made in the *Imboden* case was that the names of the informants were improperly withheld. Without agreeing with the *Imboden* opinion it is easy to be seen that the case is not in point.

Here the complaint is much stronger. Here the hearsay testimony given by informants and used against the registrant was not made known to the registrant. Here it is contended that the hearing officer did not give the registrant an opportunity, in advance of the hearing or upon the hearing, to contradict or answer the unfavorable evidence in his hands and used against the registrant by him. The complaint here is that the hearing officer did not show the F.B.I. report to the registrant. The registrant here advances the point that such unfair star-chamber proceedings was not a mere failure to give the name and address of the informants, as was true in the *Imboden* case (194 F. 2d 508 (6th Cir.)), but was a rank and flagrant violation of his right to procedural due process of law.

Should this Court conclude that the case of *Imboden v. United States*, 194 F. 2d 508 (6th Cir.), certiorari denied 343 U. S. 957, is not distinguishable, then it is here suggested

that this Court ought not to follow the decision. It is plainly wrong if the effect of the holding is found to be that it is not necessary to produce the F.B.I. report to the registrant at the hearing and place a copy of it in the file. If the decision is to be accepted as supporting the position of the Government in this case, then it is respectfully submitted that it ought to be rejected and not followed, for the reasons above mentioned and hereafter to be discussed.

It is submitted that the holding in *Imboden* that the mere withholding of the names of the informants, whose statements appear in the F.B.I. report, is erroneous. In the circumstances of the investigation and hearing required by Congress in the act, there must be a full and fair disclosure, including giving the names and addresses of the witnesses.

How can there be an appropriate or a full and fair hearing in the Department of Justice unless there is a disclosure of the names and addresses of the informants? Without a revelation of the name and address of a witness whose hearsay evidence is being considered, the registrant is in the dark as to what to combat. Unless he knows or has an opportunity of knowing who is the witness against him, he has no way of answering. He must grope in the dark and guess. He cannot impeach, explain or rebut the evidence. The starting place in answering every witness is to identify him. Masked persons might appear at a masquerade ball but they have no place in the democratic tribunal where truth is the goal.

The requirements of due process in the British Commonwealth demand that the names and addresses of witnesses in administrative proceedings be made known to the parties. *Duncan v. Cammell, Laird & Co., Ltd.*, 1942 Appeal Cases 624, so held. The court quoted with approval the language of Chief Justice Eyer thus:

"There is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means

of which the detection is made, should not be unnecessarily disclosed, if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop."

A statement to much the same effect was made by Abbott, J., and confirmed by Lord Ellenborough, C. J., in *Rex v. Watson*, (1817) 32 St. Tr. I. 101.—See also *Marks v. Beyfus*, (1890) 25 Q. B. D. 494.

Concealing the names of informants must be confined to informants in criminal investigations. The police and their informants have this privilege. But it is confined to the gathering of evidence for indictment and prosecution. The anonymity of witnesses ceases when the prosecutor produces his case before the tribunal, a court of justice. Due process in judicial proceedings requires this. The same restraint, as well as the intent of Congress to afford the conscientious objector a full and fair hearing, also removes the mask of anonymity in administrative tribunals, including draft board proceedings. Since the hiding of identity of witnesses in judicial tribunals is prohibited, by force of the same reason the concealing of names of witnesses in administrative proceedings is unfair. It prevents a full hearing, in violation of the Constitution.

No reason exists for keeping the names and addresses of the informants in conscientious objector cases secret. No danger to the informant exists, as in the case of one giving information to a prosecutor about a crime that has been committed. Reprisals to the informants are not to be feared. There is no public interest at stake that will be imperiled by making the names of the informants known.

To the contrary the public administration of law and justice will be subverted by forcing the department to reveal the names of persons testifying through hearsay F.B.I. reports. The administration of justice is blighted by keeping the names secret. This is especially true when

the informants are ~~not~~ imperiled and the only one that will be harmed by the practice is the registrant who is kept in the dark and prevented from exercising his right of rebuttal.

Congress reported (Senate Report 1268, 80th Congress, Second Session, page 14) that the exemption "is viewed as a privilege". This same Congress also explicitly stated that it was contemplated that the determination of the status would be according to fair standards consonant with constitutional procedural due-process requirements.

The fact that exemption and deferment from military service is a matter of grace or grant from Congress and is not commanded by the Constitution does not license the executive branch of the government, in the administration of the law, to defy the constitutional requirements of procedural due process.

Restraints of the Fifth Amendment against the denial of procedural due process of law are not confined to hearings before judges in courts. Neither the executive nor legislative branches of the government are above the Constitution. On several occasions the Court has held that both legislative enactments and administrative proceedings that deprive a person of his liberty and property contrary to the requirements of procedural due process of law are in conflict with the Fifth Amendment. —*Dowell v. United States*, 221 U. S. 325, 330; *Wong Wing v. United States*, 163 U. S. 228; *Diaz v. United States*, 223 U. S. 442; *Wong Yang Sung v. McGrath*, 339 U. S. 33; *Dis-
muke v. United States*, 297 U. S. 167, 172.

It is a specious argument to contend that because a matter covered by an administrative law is not guaranteed by the Constitution the agency has carte blanche authority to proceed as it wishes. Once a fact-finding agency is established to perform a quasi-judicial function (as the draft boards perform) such agency is, like any other tribunal, subject to the mandate of the Constitution expressed in

the Fifth Amendment. The agency is not autonomous. It may not prescribe and follow police-state methods with impunity. Such is contrary to the Constitution. Congress must accord the parties subjected to an administrative tribunal procedural due process of law required by the Fifth Amendment.

An administrative agency has no escape from the searchlight of the Fifth Amendment. The only way that Congress could avoid an executive department, board or tribunal from being subject to the restraints of procedural due process of law would be to not create an agency with quasi-judicial functions. Congress could have made no provision for an exemption or deferment of conscientious objectors. Had this been done we would not have the question of procedure involved here. But Congress did provide for the exemption. Congress did, however, provide for a quasi-judicial agency to determine the exemption or deferment. Congress provided also for an appropriate hearing and inquiry. The Fifth Amendment to the Constitution makes it mandatory that this administrative agency and the Department of Justice performing the function comply with the requirements of procedural due process of law in conducting an appropriate hearing.

All tribunals are subject to the provisions of the Fifth Amendment. It is well known that the federal courts cannot violate the procedural rights of a litigant guaranteed by the Fifth Amendment. Time and again determinations by an administrative agency (including draft boards) have been upset by the courts because of proceeding contrary to the requirements of procedural due process of law. The Department of Justice has no higher standing under the law than a draft board. Since the draft board proceedings themselves have been destroyed by the Fifth Amendment, notwithstanding the lack of a constitutional guarantee of exemption or deferment, then by force of the same reason the violation of the Fifth Amendment by the Depart-

ment of Justice in withholding the F.B.I. report also should be held invalid.

The basic fallacy of the decision in *Imboden v. United States*, 194 F. 2d 508 (6th Cir.), is the justification of the denial of due process of law because the recommendation of the Department of Justice was merely advisory. This is a broken link in the process of reason employed by the court of appeals in that case. Another unsound basis for the decision of the Sixth Circuit is that there is no constitutional guaranty for the making of the claim for exemption or deferment as a conscientious objector. This ground is no stronger than the one just stated, that the recommendation of the department is merely advisory. This argument of the court is equally riddled with sophistry.

The act and regulations make the recommendations of the Department of Justice to the appeal board merely advisory. That may be rejected by the appeal board. The appeal board may classify a registrant as liable for training and service in the armed forces when the Department of Justice recommends that he be classified as a conscientious objector, or vice versa. The Government argues that, because of this advisory nature of the recommendation, the Department of Justice can successfully refuse to give the registrant due process of law. The Government argues that it is not bound to place all the evidence in the file as the draft board is required to do purely because the report is advisory in nature.

It is true that the investigation and recommendation of the Department of Justice are merely advisory. This does not make the use of the illegal F.B.I. report and the non-disclosure of the names of the informants harmless error. The report was relied on. Were it not for the adverse testimony of anonymous witnesses the claim for conscientious objector classification would not have been denied.

It cannot be said that it is harmless error when the rights of the registrant here were denied by the use of the

F.B.I. report by the hearing officer and the appeal board.

The F.B.I. report was embraced, accepted and adopted by the appeal board. The unconstitutional procedure of the Department of Justice was adopted as the unconstitutional procedure of the Selective Service System. The appeal board made the invalid proceedings its own. Since the order to report is based on proceedings had before the Department of Justice, the use of the report by the draft boards vitiated the entire proceedings.

It is harmless if the report of the department is against the registrant and the appeal board grants the conscientious objector status. But when the appeal board accepts the recommendation to deny the status claimed by the registrant a different situation entirely is presented. The hearing officer has and relies on the report of the F.B.I. The Assistant Attorney General, making the recommendation to the appeal board, relies on the report of the hearing officer which is based on the F.B.I. report. The Attorney General also has before him, in making the recommendation, the F.B.I. report. He tests the report of the hearing officer with it. His recommendation is based not only on the report of the hearing officer, but also on the F.B.I. secret police report. The board of appeal in more than ninety cases out of a hundred relies on the recommendation of the Department of Justice especially when the recommendation is adverse. In this case the board of appeal accepted and adopted the recommendation of the Department of Justice based mainly on the F.B.I. report.

It is then only proper, necessary, fair, constitutional and in compliance with due process of law that the evidence gathered and recorded by the Federal Bureau of Investigation be included in the cover sheet. It was relied on by the hearing officer. The hearing officer's report was relied on by the Department of Justice in making its recommendation to the appeal board and the appeal board relied on the recommendation supported by the F.B.I. report. By all principles of fairness this evidence ought to be made avail-

able to the registrant on his trial. Without being provided the F.B.I. report the registrant is denied the right to show that there is no basis in fact for the determination made by the appeal board based on the recommendations made by the Department of Justice and the hearing officer on the conscientious objector claim of the registrant.—*Estep v. United States*, 327 U.S. 114; *Kwock Jan Fat v. White*, 253 U.S. 454.

The error and harm produced by the use of the F.B.I. report can be demonstrated by an analogy. There are certain types of judicial proceedings where the jury verdict is merely advisory. If misconduct of counsel, the jury or the court in violation of constitutional rights occurs in a trial where the verdict is merely advisory, it certainly would be ground for a new trial and reversal on appeal if the unconstitutional proceedings before the jury resulted in the verdict which was accepted by the trial court. This is what happened here. The adverse verdict against the registrant was accepted by the appeal board. The unconstitutional trial before the hearing officer invalidated the proceedings before the appeal board when the Department of Justice recommendation, adopting the hearing officer's report, was followed by the appeal board.

Suppose an attorney, during a trial before a jury in a case where the verdict was advisory, handed to the jury an exhibit that had been excluded from evidence. Also assume that the adversary did not learn of this until after entry of judgment. Putting aside the liability of the attorney for contempt of court, would it be doubted that the verdict and judgment would be set aside even if the verdict were advisory? The same situation exists here.

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board becomes a link in the chain. Since it is one of the links of the chain, its strength must be tested. (*United States v. Romano*, 103 F. Supp. 597 (S. D. N. Y. 1952)) The absence of the F.B.I. report from the

record and the withholding of it from the registrant at the hearing produces a break in the link and makes the entire selective service chain useless; void and of no force and effect. The Court held in *Kessler v. Strecker*, 307 U. S. 22, that if one of the elements is lacking, the "proceeding is void and must be set aside". (307 U.S. at page 34) The acceptance of the recommendation of the Department of Justice which has been made up without producing the F.B.I. report to the registrant in the proper time and manner makes the proceedings illegal, notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *United States v. Everingham*, 102 F. Supp. 128 (D. C. W. Va. 1951). In that case the court said:

"Under these statutory provisions, the hearing, report, and recommendation of the Department of Justice is an important and integral part of the conscription process for the protection of both the government and the registrant. The defendant had the right to have a fair hearing and a non-arbitrary report and recommendation by the Department of Justice to the appeal board.

"It does not appear that any member of the appeal board felt himself bound by this report and recommendation or how far, if at all, it influenced the decision of the appeal board, but that is not enough. The report and recommendation was transmitted to the appeal board to use as an advisory opinion, and was considered and used (as the regulations require) by the appeal board in its subsequent classification of the defendant."

This quotation was made and approved in *United States v. Bouziden*, 108 F. Supp. 395 (D. C. W. D. Okla. Novem-

ber 13, 1952). It is respectfully submitted that the fact that the act and regulations make the recommendation advisory does not prevent the broken link from ruining the required continuously legal chain.

It is respectfully submitted that the principles announced in the *Bouziden*, *Annett* and *Elder* cases should be rejected by this Court. A reading of those opinions discloses that the courts reached their conclusions without reference to Section 13 (b) of the Selective Service Act of 1948 and of the Universal Military Training and Service Act. This Court, it is submitted, ought to adopt the holding of the court below as the law applicable here.

It is submitted that the decisions in *United States v. Oller*, 107 F. Supp. 54; *United States v. Geyer*, 108 F. Supp. 70; and *United States v. Nugent*, 200 F. 2d 46, correctly interpret the law. They are in accordance with the congressional intent expressed in the act. They are also supported by the legislative history which shows the plain purpose of guaranteeing to the conscientious objector his rights fixed by Congress in the passage of the act and implemented by the president in the Selective Service Regulations—the policy or orders of the Attorney General to the contrary notwithstanding.

6. If the act is interpreted so as to authorize the procedure of the Department of Justice in refusing to disclose the F.B.I. report to the registrant and the board under Order No. 3229, then the construction will be unreasonable and produce penalties. This is condemned by this Court.

A reasonable interpretation of the statute by this Court is due, indulging all reasonable doubts concerning the meaning of the act in favor of the rights of one indicted thereunder. (*Harrison v. Vose*, 50 U.S. 372, 378). It has been said that a sensible construction should be placed on an act so as to avoid oppression, absurd consequences or flagrant injustice. It will be presumed that Congress in-

tended to avoid results of such character: (*United States v. Kirby*, 7 Wall. 482, 486-487; *United States v. American Trucking Ass'n*, 310 U.S. 534) Where a statute is susceptible of two constructions "by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter". (*United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408) The argument of the Government requires the Court to place an unreasonable construction upon the act. Additionally it raises "a succession of constitutional doubts as to such interpretation".—*Harriman v. Interstate Commerce Comm'n.*, 211 U.S. 407, 422.

It is the duty of the Court to interpret criminal statutes so as to permit the accused to make any reasonable defense and to avoid penalties and oppression. In the cases at bar the Court must indulge in a fiction to say that Congress specifically intended that hearings be based on secret evidence withheld from the registrant. Had Congress so intended, it would not have done so "by artifice in preference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process". (*Western Union Tel. Co. v. Lenroot*, 323 U.S. 490.) See also *American Power Co. v. S. & E. Comm'n.*, 329 U.S. 90, where the Court said:

"Wherever possible, statutes must be interpreted in accordance with the constitutional principles. Here, in the absence of definite contrary indications, it is fair to assume that Congress desired that § 11 (b) (2) be lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto. And when that assumption is added to the provisions of § 19, it becomes quite evident that the Commission is bound

under the statute to give notice and opportunity for hearing to consumers, investors and other persons whenever constitutionally necessary. See *The Japanese Immigrant Case*, 189 U. S. 86, 100-101."—329 U. S. at page 108.

The Court, on this same subject, said in *Lipke v. Lederer*, 259 U. S. 557: "And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded. See *Fontenot v. Accardo*, 298 Fed. 871."—259 U. S. at page 562.

"So, in *Central of Georgia R. v. Wright*, 207 U. S. 127, 138, the Court said: 'This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace.' In *Roller v. Holly*, 176 U. S. 398, 409, the Court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in *Louis. & Nash. R. R. v. Stock Yards Co.*, 212 U. S. 132, 144, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.'—*Coe v. Armour Fertilizer Works*, 237 U. S. 413 at page 425.

Chaloner v. Sherman, 242 U. S. 455, at page 460, says: "Such notice and opportunity to be heard at the inquisition was required by the law of New York though not expressly recited in the statute."

•If the statute is not interpreted in such a way as to afford the respondents the right to have produced and made a part of the selective service files the F.B.I. report, then grave doubts arise as to the constitutionality of the prescribed procedure. To avoid such consequences, the interpretation here suggested should be accepted.

TWO

The investigations and hearings, using the F.B.I. reports, under Section 6. (j) of the Selective Service Act of 1948, must comply with due process of law, which demands that the investigative reports be shown to the registrants and also placed in their draft board files.

A. It is immaterial that the conscientious objector status is a grant from Congress and not a constitutional right.

It is argued that because the conscientious objector status is a privilege and not a right it is not necessary to follow due process. While the status is a privilege granted by Congress, it does not mean that the constitutional rights of the registrant to a full and fair hearing guaranteed by the due-process clause of the Fifth Amendment can be forfeited and taken away from him.

This position of the Government is answered earlier in this brief where the case of *Imboden v. United States*, 194 F. 2d 508 (6th Cir.), is shown to be erroneously decided, *supra*, pp. 103-112.

This same kind of argument was made by the Government in *Estep v. United States*, 327 U. S. 114. It argued that the defense could not be made by Estep. The Court rejected the argument that merely because exemption and deferment were privileges the constitutional rights of the registrant to procedural due process of law could be violated. The limited defense permitted in the *Estep* case also makes the validity of the draft board proceedings dependent upon a very strict compliance with the principles of fair play. This means that a full and fair hearing in the Department of Justice as well as in Selective Service System must be accorded.—*Estep v. United States*, 327 U. S. 114.

If the lack of the constitutional right to exemption did not permit a denial of a full and fair judicial hearing in the courts called upon to prosecute cases under the act,

then why may the Department of Justice claim that it does not have to abide by due process in its administrative hearings?

It is well known that practically every administrative agency of the federal government operates in fields that are not covered by the Constitution as far as the substantive right to operate in the field is concerned. The courts have, nevertheless, required the administrative agencies carrying out the governmental regulations in the field to abide by the standards of procedural due process in administering the regulatory power of the Government. The courts have repeatedly held that the administrative agencies are subject to the restraints of the due-process clause of the Fifth Amendment. It has always been held that the due-process clause reaches administrative agencies.—Vom Baur, *Federal Administrative Law*, § 297, p. 302, Chicago, Callaghan & Company, 1942.

At an early date it was held that the right to enter this country as an alien was not a right guaranteed by the Constitution. It was held to be a statutory privilege that could be determined by administrative agency, whose determination was final. The situation is identical to that involved here. In *The Japanese Immigrant Case*, 189 U. S. 86, it was argued by the Government that because there was no constitutional right but only a statutory privilege or grant involved the procedural due-process requirements of the Fifth Amendment could not be resorted to by the immigrant. While the exclusion order was not disturbed and the dismissal of the habeas corpus petition was sustained, the Court took occasion to reject the argument of the Government that the due-process clause did not reach the orders of Commissioner of Immigration. In that case it was said that—"this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental prin-

ciples that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.”—189 U. S. 86, at pp. 100-101.

It is unnecessary for the administrative agency to accord a judicial trial as a part of due process. (*United States v. Ju Toy*, 198 U. S. 253, 263) It is necessary that the procedural steps be otherwise in accordance with the requirements of the Fifth Amendment guaranteeing notice and the right to defend or answer a charge. (*Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U. S. 88, 91-92.) The Court has held that where a statute provides for an administrative hearing the due-process clause of the Fifth Amendment requires a full and fair hearing in the sense of the traditional hearing.—*Shields v. Utah-Idaho Central R. Co.*, 305 U. S. 177, 182.

Professor Wigmore in his great work on *Evidence*, in Volume 1, section 4 (b), page 34, says: “The Federal Supreme Court has occasionally (ante sec. 4a) pointed out what it considers to be the essentials of a fair trial of fact by administrative officials—the opportunity to call witnesses, the opportunity to hear the evidence on the other side, and so on. But these casual designations do not cover even the fundamentals of a simple system of proof.”—See also *Dismuke v. United States*, 297 U. S. 167, at p. 171.

This Court recently held in *Kwong Hai Chew v. Colding*, 344 U. S. 590, that the denial of the opportunity to be heard is a violation of due process of law. The Court said:

"It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law.... Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard....

"For the reasons stated, we conclude that the detention of petitioner, without notice of the charges against him and without opportunity to be heard in opposition to them, is not authorized by 8 C. F. R. § 175.57 (b)." — 344 U. S., at pp. 596, 597-598, 603.

A somewhat different rule has been reached by the Court, however, in exclusion cases. The deportation rule stated in the *Kwong Hai Chew* case was not extended to the exclusion case where there was involved a security risk. The Court held in *Shaughnessy v. United States ex rel. Mezdi*, 73 S. Ct. 625, that an alien could be excluded from entry into the United States without a hearing. This power of exclusion was said to be a fundamental attribute of governmental sovereignty. It is observed that the rule of exclusion cases does not apply in draft board determination cases. Compare *United States v. Reynolds*, 73 S. Ct. 528. In that case the Court held that a widow suing for the negligent death of her husband under the Federal Tort Claims Act could not demand an air force report of the accident filed by the Secretary of the Air Force. There appeared in that case a reasonable possibility that military secrets were involved. National security is not involved here, as has been demonstrated in this brief.

There seems to be no doubt whatever that the Fifth Amendment reaches administrative agencies. The draft boards and the Department of Justice are not beyond the reach of the Fifth Amendment. The above discussion shows that the Department of Justice is as much under the re-

straint of the Fifth Amendment as are the draft boards when it steps in and begins to perform its function of investigation, conducting a hearing and making a report. This conclusion is inescapable when the recommendation of the Department of Justice is adopted or followed by the appeal board and the claim of the registrant is denied. (See *N. L. R. B. v. Cherry Cotton Mills*, 98 F. 2d 444, 446.) Mr. Justice Frankfurter, in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, said:

"The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

"An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked and argument on the meaning and worth of conflicting and cloudy data not apt to be helpful. But in other situations an admonition of Mr. Justice Holmes becomes relevant. 'One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point. . . . ' It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe. . . .

"Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking, and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case

against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done....

"... But it does place upon the Attorney General the burden of showing weighty reason for departing in this instance from a rule so deeply inbedded in history and in the demands of justice.... This surely does not preclude an administrative procedure, however informal, which would incorporate the essentials of due process. Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can."—341 U. S. 123, at pp. 170-173.

If a defendant were not allowed to meet the evidence in a criminal trial, there would be no question that he is denied due process of law. Should the defendant in a criminal proceeding charging him with violation of an administrative order be deprived of the right to see and meet the evidence at the administrative hearing, then by force of the same reason he is convicted without a chance to meet the evidence. The administrative shield is a mere gossamer covering. It does not protect the Government. The substantial rights of the defendant in a criminal proceeding in such circumstances are violated.

This is precisely what the court below meant when it said: "True, the hearing here was not a criminal trial. But its effects on defendant might be fully as important." [N 63]

A similar expression was made in a dissent of Mr. Justice Frankfurter. He said in the case styled *In re Oliver*, 333 U. S. 257, at page 284: "But an opportunity to meet a charge of criminal contempt must be a fair opportunity. It would not be fair if the court in which the accused can contest for the first time the validity of the charge against him; he comes handicapped with a finding against him

which he did not have an adequate opportunity of resisting."

When the proceedings of the Department of Justice are made a part of the administrative chain there can be no question that the proceedings in the department are as much subject to the requirements of procedural due process of law as are the draft board proceedings. The proceedings before the draft boards, themselves, have been held to be subject to the requirements of procedural due process of law. Time and again the determination of the draft boards has been set aside because of violation of procedural due process of law.—*United States v. Zieber*, 161 F. 2d 90 (3rd Cir.); *United States v. Stiles*, 169 F. 2d 455 (3rd Cir.); *Niznik v. United States*, 173 F. 2d 328 (6th Cir.); *Niznik v. United States*, 184 F. 2d 972 (6th Cir.); *Davis v. United States*, 199 F. 2d 689 (6th Cir.); *United States v. Garvin*, 71 F. Supp. 545 (W. D. Penna.); *United States v. Romano*, 103 F. Supp. 597 (S. D. N. Y.); *United States v. Strebel*, 103 F. Supp. 628 (D. Kans.); *United States v. Laier*, 52 F. Supp. 392 (N. D. Calif. S. D.); *United States v. Peterson*, 53 F. Supp. 760 (N. D. Calif. S. D.); *Ex parte Stanziale*, 138 F. 2d 312 at p. 314 (3rd Cir.); *Ver Mehren v. Sirmyer*, 36 F. 2d 876 (8th Cir.); *Cox v. Wedemeyer*, 192 F. 2d 920 (9th Cir.).

The steps to be taken as a condition precedent to induction must be strictly followed. Otherwise the order to report is void. (See *Ver Mehren v. Sirmyer*, 36 F. 2d 876, 881 (8th Cir.).)

"There must be a full and fair compliance with the provisions of the Act and the applicable regulations." (*United States v. Zieber*, 161 F. 2d 90 (3rd Cir.). See also *Ex parte Fabiani*, 105 F. Supp. 139.) It should be remembered that the hearing officer's report and the recommendation of the Department of Justice come to the appeal board with great weight. As already shown, the recommendations of the Department of Justice are followed in over ninety-five per cent of the cases. By force of

the same reason, if the draft board must follow accepted standards of procedural due process, then the hearing officer and the Department of Justice likewise must comply with such standards of fairness.

It is respectfully submitted that the provisions of the due-process clause guaranteeing procedural fairness in hearings reaches the Department of Justice as well as the draft boards when it steps into the administrative shoes provided for in the act and regulations.

B. Due process of law condemns star-chamber proceedings by administrative and judicial tribunals.

The procedure of trying a person in his absence or hearing evidence on trial out of his presence was well known to the authors of the Constitution and the Bill of Rights. The experience of their forefathers under the Court of Star Chamber in England was fresh in their minds. It was a common practice of that ancient iniquitous court to hear evidence *de hors* the record. Witnesses were permitted to give unsworn testimony and whisper into the ears of the judges. Prosecutors could approach the bench and supply evidence in the absence of their adversary. Secret evidence was considered without the opportunity to answer, rebut or impeach it.

The unfair star-chamber procedure employed by the Department of Justice in this case was expelled from the law of England when the Court of Star Chamber was finally done away with by James II following a short resurrection of the court after its first abolishment in 1641.—Cooley, *Constitutional Limitations*, 8th ed., Vol. I, pp. 715-716, Boston, Little, Brown & Co., 1927.

In the celebrated *Doctor Bentley's Case* (*Rex v. Cambridge University*, 1 Strange 557, 567 (1718)), a hearing and the right to defend were denied upon the trial involving the validity of an illegal writ. Justice Fortesque in that

case said: "The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. 'Adam [says God], where art thou? Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also."

The right to answer and defend is the only way that the democratic system can maintain respect and avoid sliding into oblivion. The Mosaic law allowed a defense. Even the barbarians and ancients permitted notice and allowed a defense. The Roman philosopher and lawyer, Seneca, in the days of Nero, wrote: "Who hath adjudged of aught, one side unheard, just though the judgment, were himself unjust."

The degeneration of the judicial system under the influence of the Holy Roman Empire through trials by ordeal was arrested in England and banished forever when the people compelled King John to put his hand to the Magna Carta, the 39th chapter of which provides that: "No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."

A full and fair hearing and the right to know the charge and present all defenses is as much established as a part of due process of law in criminal procedure as the Bill of Rights is established in the Constitution. McGehee, in his work, *Due Process of Law*, says: "The requirement of conformity to the 'law of the land' was intended as a guaranty against certain arbitrary proceedings on the part of the king, the enforcement of execution without any judgment, or after a mere pretext of judgment; and that the most that was guaranteed was judgment by some of the known con-

temporary methods of trial, ordeal, battle, or compurgation. [page 5] . . .

"Justice requires that a hearing and an opportunity to present defenses must precede condemnation. Around this ideal of justice has grown up the constitutional conception of 'the law of the land' or 'due process of law', but the ideal was not confined to one system of jurisprudence, and was common to thoughtful men everywhere [page 73]."

Justice Cooley, in his *Constitutional Limitations*, *supra*, says: "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society.'"—P. 736.

The denial of the right to know and defend a charge is a modern-day trial by ordeal, which pulls the Selective Service System back beyond the date of its beginning, into the Dark Ages of the Inquisition.

In *Windsor v. McVeigh*, 93 U. S. 274, plaintiff's property had been taken from him by the agents of the federal government. In ejectment proceedings his answer was stricken and he was denied a hearing. The Court, at pages 277 and 278, said: "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. . . .

" . . . But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear

and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceedings had better be omitted altogether."

It is respectfully submitted that the procedure employed by the Department of Justice in withholding from the registrant the evidence that it makes its determination upon is the modern-day practice of the Court of Star Chamber. This type of proceeding, regardless of what sort of modern covering it is wrapped in, still is condemned by the due-process clause as the anathematized ancient star-chamber proceedings. It is not valid when practiced by the Department of Justice or by any other branch of the government. —See also the concurring opinion of Mr. Justice Black in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 146, 148, 149.

C. Due process requires an opportunity to know the evidence used, even when confidential.

The law of the land (due process) in requiring fair play led the Court to reach the results that it did contrary to the opinions of all the lower federal judges (except two) when it decided *Estep v. United States*, 327 U. S. 114.

The Court interpreted the 1940 act to require a hearing in courts so that there could be no constitutional jurisdictional or due-process violation. It also contemplated an interpretation of the act and regulations that gave meaning to the limited defense that it permitted; that is, it was of grave concern to the Court that when a defendant came in to defend a charge against him he had been accorded full protection in the administrative proceeding. Speaking for the Court in *Estep v. United States*, 327 U. S. 114, Mr. Justice Douglas said:

"But if we now hold that a registrant could not defend at his trial on the ground that the local board had no

jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*.

"... Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case."—327 U.S. at pp. 124, 125.

Mr. Justice Murphy, concurring, said at pages 126-127, 128:

"... Thus the stigma and penalties of criminality attach to one who willfully disobeys an induction order which may be constitutionally invalid, or unauthorized by statute or regulation, or issued by mistake, or issued solely as the result of bias and prejudice. The mere statement of such a result is enough to condemn it....

"First. It is said that Congress so designed the Selective Training and Service Act of 1940 as to preclude courts from inquiring into the validity of an induction order during the course of a prosecution under § 11 for a willful failure to obey such an order. But if that is true, the Act is unconstitutional in this respect. Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights. A court having jurisdiction to try such a case has a clear, inherent duty to inquire into these matters so that constitutional rights are not impaired or destroyed. Congress lacks any authority to negative this duty or to command a court to exercise criminal jurisdiction without regard to due process of law or other individual rights. To hold otherwise is to substitute illegal administrative discretion for constitutional safeguards. As this Court has previously said, 'Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement de-

signed to give effect to administrative action going beyond the limits of constitutional authority. (*St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52) This principle has been applied many times in the past for the benefit of corporations. (*Ohio Valley Water Co. v. Ben Aron Borough*, 253 U.S. 287, 289; *Dayton-Goose Creek Ry. v. United States*, 263 U.S. 456, 486; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432; *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210.) I assume that an individual is entitled to no less respect....

"A construction of the Act so as to insure due process of law and the protection of constitutional liberties is not an amendment to the Act. It is simply a recognized use of the interpretative process to achieve a just and constitutional result, coupled with a refusal to ascribe to Congress an unstated intention to cause deprivations of due process." —327 U.S. at pp. 126-127, 128.

It was argued by the Government and held by the federal courts that silence of the act implicitly required that the defendant in a criminal prosecution under the act be denied the right to challenge the validity of the draft board order with which he refused to comply. The act contained no explicit provision commanding the right to make the defense. The Court held that it was intended by Congress that a full and fair judicial hearing ought to be accorded a registrant in order to protect his rights. By force of the same reason it must be assumed that procedural due process requires that the term "hearing" used in the act for the determination of conscientious objector claims demands a full and fair hearing in the sense that the word "hearing" is used to mean in administrative law. In the absence of any explicit provision in the act it must be assumed that Congress had in mind a full and fair hearing commanded by the due-process clause of the Fifth Amendment. The fact that the secret investigative report of the F.B.I. was held to be confidential

by the Attorney General (40 Op. A. G. 8, 1941) does not in any way destroy or weaken the great commandment of procedural due process in the Fifth Amendment, recognized in Section 13 (b) of the Selective Service Act of 1948.

It has been held that a party does not have the right to delve into and pry into all the records of an administrative agency or examine secret reports not directly relied on. (*United States ex rel. St. Louis Southwestern Ry. Co. v. Interstate C. C.*, 264 U. S. 64; *United States v. Abilene & S. Ry Co.*, 265 U. S. 274.) It has also been held that procedural due process requires that where the facts contained in a secret report are relied on by the administrative agency it must be produced and made available at the trial. "If that were not so, a complainant would be helpless, for the inference would always be possible that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." Mr. Justice Cardozo in *West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U. S. 63, 68, 69.

Another important case on this subject is *Morgan v. United States*, 304 U. S. 1. That case presented a question on the validity of an order of the Secretary of Agriculture. He fixed maximum rates charged by market agencies under the Packers and Stockyards Act. (7 U. S. C. § 181-229) The Court held that a fair hearing commanded an "opportunity to know the claims of the opposing party and to meet them." Chief Justice Hughes added that the party was entitled to be "fairly advised" and "to be heard" upon the issues. He said that administrative agencies must guarantee "basic concepts of fair play".—304 U. S. at 18, 22. See also *Lloyd Sabaudo Societa Anonima v. Elting*, 287 U. S. 329, 335-336.

The general definition of a hearing in administrative proceedings has been held to be one that had "a quality resembling that of a judicial proceeding. Hence it is frequently described as proceedings of a quasi-judicial char-

acter." (*Morgan v. United States*, 298 U. S. 468, 480, 481-482.) See also *Wong Yang Sung v. McGrath*, 339 U. S. 33, 50-51, where the Court said, "It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

The Department of Justice contemplates a hearing very much akin to the hearing that is required in judicial or quasi-judicial proceedings. The notice of hearing and the instructions sent to the registrants stated the right to bring witnesses and to have a full hearing.

While the Selective Service Regulations do not permit a registrant to be represented by counsel upon the personal appearance and oral hearing before the local board, (§ 1624...; *United States v. Pitt*, 144 F. 2d 169; *Niznik v. United States*, 173 F. 2d 328) the courts have held that draft board proceedings are quasi-judicial.—*Gibson v. Reynolds*, 172 F. 2d 95 (8th Cir.); *Dodez v. Weygandt*, 173 F. 2d 965 (6th Cir.). *Contra United States v. Bousiden*, 108 F. Supp. 395.

In *Kwack Jan Fat v. White*, 253 U. S. 454, it was held that the suppression or omission of evidence was not a fair hearing. It was pointed out that everything relied upon in the administrative determination must be included in the record.—253 U. S. at 464.

In *United States v. Abilene & S. Ry. Co.*, 365 U. S. 274, 290, it was held that a party before an administrative agency must be apprised of all evidence submitted and made a part of the determination.—See also *Interstate Commerce Comm'n v. Louisville & N. R. Co.*, 227 U. S. 88, 93.

Recent decisions of the Court state the American historical standard of fair play in requiring that documentary evidence be revealed in an administrative hearing. One of these cases, in which an F.B.I. report had been used as the basis for an administrative determination, was *Joint Anti-*

Fascist Refugee Committee v. McGrath, 341 U. S. 123. The Court noted that the petitioner was listed as a subversive organization without a hearing and without having an opportunity to refute the evidence contained in the F.B.I. report. The Court said that the parties "were not informed of the evidence on which the designation rests". (341 U. S. 123) —See also the concurring opinion of Mr. Justice Frankfurter at pages 165, 171-173, and the concurring opinion of Mr. Justice Douglas at pages 175, 177, 179.

The Court, in *Bailey v. Richardson*, 341 U. S. 918, by an equally divided court, affirmed the lower court, as to the question of concealment of evidence in the administrative hearing.

It was held that since an employee could be discharged without any reason by the Government, petitioner could be deprived of the evidence in the administrative hearing. See the majority opinion of the United States Court of Appeals in *Bailey v. Richardson*, 182 F. 2d 46, where, at page 51, it is said: "Appellant says that the 'evidence' does not include in our jurisprudence, information secretly disclosed to a hearing tribunal. That is certainly true . . ." The dissenting judge in that case, in spite of the fact that it was a matter of government control over employees, said, at page 69: "Aliens are entitled to a fair hearing in deportation proceedings, and this despite the fact that 'there is no express requirement for any hearing or adjudication in the statute authorizing deportation'." This dissent is mentioned, because four justices of the Court dissented in the case dealing with discharge of government employees who have been thought to have no right to protest a discharge nor to demand a reason.

In *Eagles v. Samuels*, 329 U. S. 304, the Court approved the use of the theological panel. The panel made a report which was made a part of the file. It was available to the registrant. It was not withheld to the injury of the registrant as here. The Court, speaking through Mr. Justice

Douglas, held that even the information that was received by the special panel and given to the local board, in order to afford due process, had to "be put in writing in the file so that the registrant may examine it, explain or correct it, or deny it. There is, moreover, no confidential information that can be kept from the registrant under the regulations".—(329 U. S. at 313) *Degraw v. Toon*, 151 F. 2d 778 (2nd Cir.); *Levy v. Cain*, 149 F. 2d 338 (2nd Cir.); *United States v. Balogh*, 157 F. 2d 939 (2nd Cir.); judgment vacated, 329 U. S. 692; affirmed on other grounds, 160 F. 2d 999.

The term "opportunity to be heard" has been judicially defined innumerable times. This Court has expressed itself on many occasions as to what due process of law requires on the opportunity to be heard. The Supreme Court of Washington has summarized very well the law on this question. In *Luellen v. City of Aberdeen*, 20 Wash. 2d 594, 148 P. 2d 849, the court said:

"The opportunity to be heard has at least three substantial elements: (1) the right to know seasonably the charges or claims preferred; (2) the right to meet the charges with witnesses and evidence; and (3) the right to have the aid of counsel. If any of these rights are denied a party, he does not have a hearing that is conformable to the elementary standards of fairness and reasonableness. No statement of the charges made against the appellant having been given him, nor any notice of any hearing having been given or accorded him, his removal was illegal and of no force or effect."—20 Wash. 2d at p. 607.

This Court said, in *State of Washington ex rel. Oregon R. R. & Navigation Co. v. Fairchild*, 224 U. S. 510, concerning the requirement of a fair hearing that if "this were true the defendant's position would be correct, for the hearing which must precede the taking of property is not a mere form. The carrier must have the right to secure and present evidence material to the issue under investi-

gation. *It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established*". (Italics supplied)—224 U. S. at p. 524.

In an older case, *Turpin v. Lemon*, 187 U. S. 51, at page 57, this Court said that due process of law meant that "it must give them an opportunity to be heard respecting the justice of the judgment sought".

Mr. Justice Frankfurter, in *United States v. Lovett*, 328 U. S. 303, concurred in the opinion of the Court. Among other things, he said at page 328: "This experience serves as a powerful reminder of the Court's duty so to deal with Congressional enactments as to avoid their invalidation unless a road to any other decision is barred."

In *re Oliver*, 333 U. S. 257, 264, stated that reasons of expediency "have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail".

While the draft board proceedings do not directly result in fining and imprisonment, the sanctions of the act based on the proceedings do this very thing. The principle stated applies here even though the proceedings are not criminal in nature.

The essence of a full and fair hearing is aptly stated in *Matter of Rothenberg v. Board of Regents*, 267 App. Div. (N. Y.) 24. It is there said:

"Although it would not compel the production of these reports or permit petition to examine them, the subcommittee which heard the charges examined them during the course of the trial. The reports themselves were not identified and do not appear in the record before us. All this was highly prejudicial to the petitioner."—267 App. Div. (N. Y.) at p. 25.

The Government contends that the court below is inconsistent and that the court below rendered a decision in

the cases at bar directly in conflict with its holding in *Brandon v. Downer*, 139 F. 2d 761. The respondents submit that the *Brandon* case can be distinguished.

It appeared in the *Brandon* case that the only piece of adverse evidence contained in the F.B.I. report, which was relied upon by the hearing officer in making his report, was that the registrant had voluntarily taken a physical examination preliminary to a voluntary enlistment into the armed forces after the claim was made. The registrant admitted this fact. There was no question about the need to contradict or reply. He confessed and attempted to avoid the impact of the confession by saying that his wife nagged him into doing it. He said that it was the result of impulse and that he later regained his senses and repented from his backsliding from his conscience. The hearing officer, notwithstanding, recommended the registrant for classification as a conscientious objector. The court of appeals specifically found that there was nothing unfavorable in the F.B.I. report and that the hearing officer relied upon nothing unfavorable in it. (139 F. 2d 765) It was also said that the registrant failed to subpoena the report at the trial. This failure would not raise a presumption of its being unfavorable.

Since the court below decided both cases and in view of the above stated distinction, it is obvious that there existed to the court a difference. The court did not consider there was any similarity or conflict. For this reason it is not proper to say that the court below was inconsistent.

Strong reliance has been put on *Elder v. United States*, (No. 13,405, Ninth Circuit, February 24, 1953). This decision conflicts with that of the court below in these cases. If there is any conflict to be found, it seems that the Government could easily locate it in the conflicting holdings made by the Court of Appeals for the Ninth Circuit on this problem in *Chen Hoy Quong v. White*, 249 F. 869 (9th Cir.). That court held that the failure to disclose a secret and confidential communication relied on by an immi-

gration hearing officer violated the procedural rights to due process of law. The court set aside an order denying an alien admission to the United States on the ground just stated.—See also *Bachus v. Owe Sam Goon*, 235 F. 847, 253; *Chin Ah Yoke v. White*, 244 F. 940, 942.

Even where the facts are actually known to the hearing officer, which is not the case here, the administrator cannot base his decision or recommendation upon it.—*Baltimore & Ohio R. Co. v. United States*, 264 U. S. 258, permitting a railroad to acquire terminal roads. *Southern R. v. Virginia*, 290 U. S. 190, 198. *Market St. Ry. v. R. Comm'n of California*, 324 U. S. 548, 562.

In *Degraw v. Toon*, 151 F. 2d 778 (2nd Cir.), a draft board order was held to violate due process. The board considered evidence which damaged the registrant. It was a letter from two members of the advisory board. The court held that the opportunity to know and rebut damaging evidence goes to the heart of the controversy.—See also *United States v. Kowal*, 45 F. Supp. 301 (D. C. Del.).

An appropriate quotation from a former decision in this Court related to this problem shall now be called to the Court's attention. In *Lloyd Sabaudo Societa Anonima v. Elting*, 287 U. S. 329, the Court said:

"The Act of Congress confers on the Secretary great power, but it is not wholly uncontrolled. It is a power which must be exercised fairly, to the end that he may consider all evidence relevant to the determination which he is required to make, that he may arrive justly at his conclusion, and preserve such record of his action that it may be known that he has performed the duty which the law commands. Suppression of evidence or its concealment from a party whose rights are being determined by the administrative tribunal has been held to be so unfair as to invalidate the administrative proceeding. *Kwock Jan-Fat v. White*, *supra*; *Lewis v. Johnson*, 16 F. 2d 180. It

is equally offensive to conceal from the experts, whose judgment is accepted as controlling, facts which might properly have influenced their opinion."

The "experts" there referred to, for the purpose of determining the conscientious objector status, are the members of the appeal board. It is their judgment that is "accepted as controlling facts". Therefore since the recommendation of the Department of Justice "influenced their opinion", it is necessary that the F.B.I. report be produced to the appeal board, the "experts".

The only case under the act that is directly in point on this issue is *United States v. Oller*, 107 F. Supp. 54. In *United States v. Geyer*, 108 F. Supp. 70, Judge Hincks stated that he agreed with Judge Smith that the withholding of the F.B.I. report was a denial of due process. It is submitted that the holding of Judge Smith that there is a denial of procedural due process in situations of this sort ought to be followed here.

D. Restrictive judicial review in draft cases (since it is confined to the administrative record) requires that the F.B.I. report be produced at the Department of Justice hearing for examination by the registrant and made a part of the administrative records, and this cannot be cured by even a production of it to the district judge in court on judicial review.

Except in the case of legislative agency determinations in practically all of the cases where there has been any restriction or narrowing of the right to see adverse evidence in quasi-judicial hearings of an administrative agency, the law allows a *de novo* hearing in the court on judicial review. This protection of the aggrieved party removes practically all of the injury or damage from the withholding of the evidence or making a determination on evidence not in the file. But such is not the case here. In the case at bar the Court is confronted with an entirely different situation.

It is here appropriate to consider the statement appearing in Davis on *Administrative Law*:

"May administrative procedural deficiencies be compensated for by opportunity for a judicial review which is not *de novo*? One might suppose that the answer is a clear no, because the party is by hypothesis entitled to a fair hearing on the merits; he fails to get it before the agency because of the procedural deficiency, and he fails to get it before the court because the scope of review is limited. . . .

"... if the court will be strongly influenced by the agency's view, if in spite of the theoretical scope of review the practical inquiry may be into reasonableness rather than rightness, if only the exceptional case can go to court—if for any reason the administrative decision importantly affects the final outcome—safeguards at the administrative stage should be preferred to safeguards provided by judicial review. . . .

"But a judicial review of a limited scope ought not to be regarded as a substitute for full administrative hearing, and sometimes a theoretical right of review is illusory." —Davis, *Administrative Law*, §§ 75-76, pp. 268, 269, 272, St. Paul, West Publishing Co. 1951.

The defense allowed by *Estep v. United States*, 327 U. S. 114, in a criminal proceeding that results from denial of a claim for conscientious objector deferment is restricted. *Cox v. United States*, 332 U. S. 442, confines the review to the selective service file. This is no *de novo* inquiry by the court. This demands the production of the F.B.I. report at the hearing in the Department of Justice. The defendant must rely upon the record made in the Selective Service classification proceeding. He has no other proof. It must be produced, since the Court cannot grant a trial *de novo* and cannot weigh the evidence. (*Estep v. United States*, 327 U. S. 114; *Cox v. United States*, 332 U. S. 442.) If the Department of Justice may conceal the F.B.I. report upon which, in part, it makes a recommendation of classification,

then the limited protection afforded a defendant by the case of *Estep v. United States*, 327 U. S. 114, has been withdrawn from the defendant before he gets to court.

The doctrine of *N. L. R. B. v. Cherry Cotton Mills*, 98 F. 2d 444, supports the contention here made that strict compliance of the requirements of due process be exacted. A broad and liberal field for the Government to operate in would be permissible if there were a broad and extensive judicial review. Since there is not, the usual extensive review permitted in draft board proceedings, the procedural requirements for the agency, must be complied with. Especially should procedural due process and fair treatment be strictly required. Limited judicial review and no *de novo* hearing in court means strict and limited liberty for the administrative agency in the carrying out of its functions. In *N. L. R. B. v. Cherry Cotton Mills*, 94 F. 2d 444, the court said that "the very fact that the Board's findings of fact are to be generally conclusive but makes it more necessary that they be made with fairness and according to the safeguards established by law". (Italics supplied)—94 F. 2d 444 at p. 446.

It is plain, therefore, that every reason exists for the courts to be astute to see that every administrative safeguard is strictly complied with. The proceedings are fraught with dangerous consequences to the registrant if he fails to succeed before the administrative agency. He must either refuse to obey and face jail or involuntarily submit to military jurisdiction which is no place for the conscientious objector. It means court martial to every sincere religious objector. These are grave hazards that one should not be subjected to until the law and regulations have been strictly complied with by the administrative agency.—*Ver Mehren v. Sirmyer*, 36 F. 2d 876 (8th Cir.).

Should the registrant be a sincere conscientious religious objector and, desiring not to violate his conscience the act was designed to protect, appeal to the civil courts by

refusing to submit to induction, he also finds himself faced with heavy penalties.

Regardless of what course he takes he is confronted with serious difficulties. It is a predicament, indeed. Unless all administrative procedures are complied with there is very little hope of the registrant's getting a right determination of his claim in the administrative agency. If they are not fully granted and should the law and the regulations not be strictly construed in favor of the registrant, he has little hope for relief in the courts, either before induction or after induction. The limited scope of review and the rule confining the courts to the written record of the administrative agency preclude any correction or administration of equity by the courts. In this circumstance there is, accordingly, every reason to insist that the entire administrative proceeding, both before the draft boards and the Department of Justice, be fair, just and complete before any liability for training and service can be found to exist. Strict and limited review requires strict compliance by the Government with the law. This means that the Court should hold that the failure to produce the F.B.I. report makes the record incomplete. This incomplete record shows an unfinished hearing in the Department of Justice and before the appeal board which deprives the registrant of procedural due process of law. It should be so held by the Court, as was held by the court below: "True, the hearing here was not a criminal trial. But its effects on defendant might be fully as important." [N 63]

E. The fact that records of the Department of Justice are confidential and privileged does not outweigh the requirements of procedural due process guaranteed by the Constitution, since the order of the Attorney General must yield to due process—the privilege is waived in the case.

Even though the records sought by the subpoenas are claimed to be confidential by the Attorney General's Order

No. 3229 issued pursuant to 5 U. S. C. Section 22, they must be produced because such documents are a part of and form the basis of the administrative determination and action supporting the indictments questioned by the registrants.

The only time that the privilege of the Department of Justice pursuant to Attorney General's Order No. 3229 (5 U. S. C. 22) has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Court refused to compel the revealing of evidence that would endanger national security in the case of *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537. But even in such a case two justices thought that the evidence ought to be revealed. Mr. Justice Frankfurter said in his dissent at page 549:

" . . . Congress ought not to be made to appear to require that they incur the greater hazards of an informer's tale without any opportunity for its refutation, especially since considerations of national security, insofar as they are pertinent, can be amply protected by a hearing *in camera* . . . "

Mr. Justice Jackson in his dissent wrote:

"Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace of free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary operations on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddling, and the corrupt to play the role of informer undetected and uncorrected. Cf. *In re Oliver*, 333 U. S. 257, 268. . . . Likewise, it will have to be much more

explicit before I can agree that it authorized a finding of serious misconduct against the wife of an American citizen without notice of charges, evidence of guilt and a chance to meet it."—338 U. S. at pages 551-552.

There is surely no need under the guise of national security to conceal the contents of an F.B.I. report of a conscientious objector. It is not one that may affect national security. After all, the F.B.I. report of the conscientious objector merely deals with a man's daily conduct, his religious practices and his habits. If a question of security or national interest should ever come up in the report of the F.B.I. concerning a conscientious objector, the Attorney General could show it. Then there would be no difficulty in keeping such matters secret. To deprive a man of valuable evidence that may affect his liberty on the ground of mere administrative privilege without some good ground for it is repugnant to free institutions. This was stressed in the concurring opinion of Mr. Justice Frankfurter in the case of *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 at page 172. That was the opinion of Mr. Justice Frankfurter under an order of the Attorney General that required appropriate investigation and determination.

Unless the Government can show some legally recognizable ground for refusing to produce the F.B.I. report at the hearing before the Department of Justice, then the F.B.I. report must be produced at such hearing for inspection by the registrant. The reasons why the report of the F.B.I. must be produced have been set forth by the registrant. In opposition to these points the Government argues that Order No. 3229 of the Attorney General is sufficient to overcome the requirements of the Constitution, draft law, regulations and "fair play". However, Order No. 3229 was issued pursuant to 5 U. S. C. Sec. 22. That statute provides that the order shall not be in contravention of law. It has been shown that the due-process clause of the Fifth Amendment requires production of all documents used at a hear-

ing. The draft law requires a hearing. The regulations require a hearing and an opportunity to be heard. Order 3229, as here applied, is, therefore, in contravention of law. The regulations adopted pursuant to the draft law provide that all papers pertaining to a registrant shall be put in his cover sheet (32 C. F. R. § 1621.8). This is a definitive provision adopted for draft registrants and, in violation of that provision, the Government offers Order 3229 to keep a registrant from knowing what the law says he should know.

It is further submitted that Order No. 3229, as construed and applied by the Attorney General in this case, violates the requirements of due process of law, Section 13 (h) of the Selective Service Act of 1948, and Section 3 (c) of the Administrative Procedure Act.

While the Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party of the right to see and use documents. That was decided in *United States ex rel. Touhy v. Ragen*, 340 U. S. 462, at 469:

"... But under this record we are concerned only with the validity of Order No. 3229. The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge, must await a factual situation that requires a ruling. This case is governed by *Boske v. Comingore*, 177 U. S. 459."

In a concurring opinion, Mr. Justice Frankfurter said at page 472: "There is not a hint in the *Boske* opinion that the Government can shut off an appropriate judicial demand for such papers."

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might affect the

interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valuable evidence to which he is entitled by law. This was expressed in the case of *Bank Line v. United States*, 163 F. 2d 133 (2nd Cir.), by Judge Clark in a concurring opinion at page 139: "... but I think no general statement of prejudice to its best interests can or should be applied to any branch of the government, including the armed forces ..."

Order No. 3229, on the other hand, has a provision which would seem to allow disclosure of the F.B.I. report to a registrant. That provision does not allow disclosure of the report "for any purpose other than for the performance of his official duties." This would allow disclosure of the F.B.I. report to the registrant because the investigation is made for the hearing before the Department of Justice, at which the registrant is entitled to an opportunity to be heard. The reasons are: (1) it was in the performance of official duty by the hearing officer, and (2) his official duties to both the registrant and the appeal board could not be performed without disclosing all the evidence that he had before him, including the secret F.B.I. report.

Also, since the regulations allow a registrant to see all papers in his file and also require that all papers pertaining to the registrant be put in his file, it would be in performance of duty to let a registrant see the report of the F.B.I. Order No. 3229 should not be allowed to disrupt the long historical recognition of conscientious objection by concealing evidence that Congress meant the registrant to have in his file.

Order No. 3229 ought not to be used as a shield to keep a claimant to conscientious objection deferment from knowing the reason for action taken by the hearing officer and the appeal board. Officials who may not agree with the views of conscientious objection should not be allowed to defeat their claims by secret evidence. Overzealous officials are apt

to express their own conclusions in the facts, if they are permitted to conceal them, in contravention of Section 13 (b) of the Selective Service Act of 1948 and Section 3 (c) of the Administrative Procedure Act.

A practical consideration of the matter is against secret evidence before the Department of Justice. The party who appeals is making a claim as a religious man. If we are going to deny religious men evidence to prove their cases, we are laying a foundation for atheists and low-minded persons to impair the reputation of religious men and to bring religion into disrepute. On this see *Wigmore on Evidence*:

‘It is urged, to be sure (as in *Beaton v. Skene*) that the ‘public interest must be considered paramount to the individual interest of a suitor in a Court of Justice’. As if the public interest were not involved in the administration of justice! As if the denial of justice to a single suitor were not as much public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight. ‘Necessity!’, as Joshua Evans said, ‘is always a suspicious argument, and never wanting to the worst causes’....

4. If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined upon its merits. But the solemn invocation, in the precedents above chronicled, of a supposed inherent secrecy in all official acts and records, has commonly only a canting appeal to a fiction. It seems to lend itself naturally to a mere sham and evasion.”—P. 790.

“But the vast extension, in modern times, of administrative law regulating the affairs of the individual citizen, is presenting a large scope for this claim of privilege. The possibilities of such abuse are plainly latent in this supposed privilege. There is needed only the willingness to exercise them.”—P. 791.

"'No nation' (in the words of a great American jurist): 'ever yet found any inconvenience from too close an inspection into the conduct of its officers. But many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses which were imperceptible only because the means of publicity had not been secured.'" —P. 792.

"It's foundation is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production."—P. 796. *Wigmore on Evidence* (3rd ed.), pp. 790, 791, 796.

The above great authority, Wigmore, is enough to set at rest any general claim of privilege in the hearing before the Department of Justice. But on the matter of refusing to reveal the identity of informers, we may first ask what an informer is. Generally speaking, an informer is one who discloses to public officials some violation of law. It is natural that such an informer must be protected from reprisal by a law violator. And even such informers are not always protected under the claim of privilege.

The man making a claim for deferment under the conscientious objector provisions of the statute is making a claim as a man of religion. Usually, there is no question of law violation by him. The matter sought for by the Department of Justice is his religious practice and general habits, his character and good faith. This is not a search for law violation. Persons who give information on such matters cannot be called informers, in the true meaning of the word. See again what *Wigmore on Evidence* (3rd ed.) says at sec. 2374 (f) entitled "Privilege for Communications by Informers to Government".

A general refusal to disclose the identity of witnesses in the F.B.I. report in every case may be harmful in many ways. Sometimes there may be adverse evidence based upon difference in religious interpretations. A man might

be attending a church different from the one in which he has membership. A person might draw a conclusion about an objector without knowing him well, but basing his conclusion upon his own predilections. One might be misunderstood or misquoted by the F.B.I. A neighbor might have a son in the military service and try to hurt the case of a conscientious objector who he feels should not have a better status than his son. There are many other reasons that have nothing to do with law violation.

Such matters as names and addresses ought to be disclosed at the hearing before the Department of Justice, since law violations are not involved and there is no question of reprisal. A claimant to conscientious objector deferment would quickly reveal his claim as false if he undertook, in some way, to seek reprisals against any witness for the F.B.I.

The argument of the Government that the procedure condemned by the court below is adequate is not borne out by the examples cited to prove this contention. In the first place, a registrant cannot always prove that specific charges are false. If an atheist falsely gives evidence that the registrant had told him that he would fight for Russia, how can the registrant overcome this false evidence without knowing who gave it? It is a question of his word against the liar, and, under the law of limited proof, the liar's word creates a basis in fact which results in a criminal conviction without a chance to prove the untruth of the evidence. This argument also applies to that adverse evidence which tends to show an irreligious or nonpacific state of mind. This cannot be effectively overcome, as contended, by the registrant's demeanor at the hearing, because one cannot judge a person's character on one appearance, nor is favorable evidence sufficient, even if given by those who may have influenced the registrant. As already said, such evidence, even if believed, is counteracted by the adverse evidence which is concealed, and the latter evidence creates a basis in fact for

the classification, which cannot be disputed in court. If an atheist gives false evidence that he saw the registrant carry a gun on a Sunday, he is attacking the religious professions of the registrant and also his conscientious objector claim. There is no way to prevent a conviction on this evidence, except to let the registrant see the F.B.I. report, so that he may be able to meet it.

This Court has even held that an informer of law violations may be identified under certain conditions. See *Scher v. United States*, 305 U. S. 251 at page 254: "Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense as for example where this turns upon an officer's good faith. *Seguro v. U. S.*, 1 Cir., 16 F. 2d 563, 565; *Shore v. U. S.*, 60 App. D. C. 137, 49 F. 2d 519, 522; *McInnes v. U. S.*, 9 Cir., 62 F. 2d 180."

If the law, regulations and Order No. 3229 are construed to allow concealment of the F.B.I. report in the administrative proceeding, then the order is being used to evade the spirit and decision in the *Estep* case (327 U. S. 114) and many other decisions. That case contemplated the consideration in the criminal trial of all the evidence used in the classification proceeding. It must be construed as forbidding concealment of a part of the record in the classification proceeding that would have the effect of depriving a defendant of the defenses that the decision said he should have. If the Government may safely conceal the F.B.I. report it is put in the position of sending every conscientious objector to jail on secret evidence. This is clearly against the intention of Congress and the legal history of conscientious objection.

The F.B.I. report is a gathering of testimony and evidence to be used by the hearing officer and Department of Justice in connection with the recommendation made by the department to the appeal board on the bona fides of the claim for the classification as a conscientious objector. When

the F.B.I. report is tendered to the hearing officer for his use in making findings of fact, whatever privilege it enjoyed up to that point was lost and disappeared completely and forever, the privilege having been waived when it was resorted to and relied on to support a recommendation as to the claim of the registrant for classification as a conscientious objector.

United States ex rel. Touhy v. Ragen, 340 U.S. 462, is not in point. There the proceeding did not involve the Government as a party or a criminal proceeding. (See note 6 of that opinion.) The specific provisions of the Rules of Criminal Procedure authorizing production of documents were not there involved. The decision involved the validity of Order No. 3229 on its face. (See notes 1 and 2 of the opinion for the order and Supplement No. 2.) It is the validity of the order, as construed and applied to the particular facts, that the Court is here concerned with.

The principle which distinguishes the *Touhy* case from this case is well expressed in *Kentucky-Tennessee Light and Power Company v. Nashville Coal Company*, 55 F. Supp. 65 (W. D. Ky.) as follows:

"I do not believe that the rule or the statute is applicable to the present case. In both of the cases referred to the federal employee involved was called as a witness and declined to testify. That is essentially different from being a party to the suit where there is a contest between the plaintiff and the defendant involving property which the defendant has taken into his possession."

It has been repeatedly held that Order No. 3229 and 5 U. S. C. 22 do not establish an inexorable privilege and command prohibiting disclosure of the F.B.I. report in judicial proceedings. When it has become material in proceedings brought by the Government, it has been repeatedly held that the privilege was waived and the Government could not successfully refuse to produce the report when demanded. It seems that when it became material in these

administrative proceedings to determine the validity of the registrant's claim for classification as a conscientious objector, for the same reasons the F.B.I. report must be produced. The citizen has the same rights to know the evidence against him before the administrative tribunal as when before the judicial tribunal. The administrative agency stands on no higher level before the Constitution than does the court.

"A prosecutor must, to be fair, not only use the evidence against the criminal, but must not willingly ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged. It is manifest in this matter that some one identified with the prosecution, as the circumstances indicate very clearly, ignored a very material piece of evidence which, if it had been brought to the attention of the jury or the trial judge, would certainly have resulted in the acquittal of this relator . . . another Judge has said—'Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.' *Hurd v. People*, 25 Mich. 405."—*United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382, 387.

The argument of the Government and the cases relied upon by it that the withholding of the F.B.I. statement is proper and required by Order No. 3229 and 5 U. S. C. 22 have been distinguished in *United States v. Andolschek*, 142 F. 2d 503 (2nd Cir.). There the court said: "However, none of these cases involved the prosecution of a crime consisting of the very matters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While we must accept it as lawful for a department of the government to suppress documents, even when they will determine controversies

between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the document may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave transactions in the obscurity from which a trial will draw them, or it must expose them fully."

The decision by Judge Hand in that case is applicable here. It is supported by reasonable English authority. In *Duncan v. Cammell, Laird & Co., Ltd.*, 1942 Appeal Cases 624, the court said:

"In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential'. . . . In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damaged, for example, where disclosure would be injurious to national defense; or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."—1942 Appeal Cases at p. 642.

The competence of the document has been established by sources outside the document itself. Under the act and regulations the F.B.I. report is relied on by the officials of the Selective Service System in making their final classification. This situation makes inapplicable the principle

relied on by the Government. (*United States v. Krulewitch*, 145 F. 2d 87 (2nd Cir.).) In that case the court said: "But neither of these situations is like that at bar, where the competence of the document appeared without inspection, and inspection was necessary only to fulfill a procedural condition to its admission. In that situation inspection loses its character as a prying into the preparation of the prosecution and becomes merely a means of releasing evidence pregnant with importance in ascertaining the truth."

United States v. Beekman, 155 F. 2d 580 (2nd Cir.), involved a prosecution for violations of the OPA regulations. The trial court quashed the subpoena on a motion by the Government. On appeal the court reversed on account of the error. The court said: "We have recently held that when the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege."

In *United States v. Cotton Valley Operators Committee*, 9 F. R. D. 719 (W. D. La. 1949), the defendants were charged with a violation of the Sherman Act. The defendants moved for discovery under the Rules of Civil Procedure. The Attorney General was ordered to produce all F.B.I. reports and other records relating to the activity of the defendants so that the trial court could determine whether they were privileged as claimed by the Attorney General. On refusal to produce, the trial court dismissed the Government's action. It appealed to this Court. The dismissal was affirmed by an equally divided court.—339 U. S. 940 (1950).

Department of Justice Order No. 229, relied on by the Government in support of its position that it may not be required to produce the documents requested; gets its life from Section 22 of Title 5 of the United States Code. This section provides that the regulations must be "not inconsistent with law".

The regulation, as construed and applied by the Attorney General in this case, is invalid and "inconsistent with law" expressed in Section 1670.17 of the Selective Service Regulations (32 C. F. R. § 1670.17) and in the Federal Rules of Criminal Procedure, Rule 17 (c), as interpreted in *Bowman Dairy Co. v. United States*, 341 U. S. 214. The rule is law and has the effect of an act of Congress. (*Beasley v. United States*, 81 F. Supp. 518, 527 (E. D. S. C. 1948).) A departmental regulation against disclosure must yield to an Admiralty Rule.—*O'Neill v. United States*, 79 F. Supp. 827, 830 (E. D. Pa. 1948). Order No. 3229 must also yield to Section 13 (b) of the Selective Service Act of 1948 and Section 3 (c) of the Administrative Procedure Act.

In *United States v. Schine Chain Theatres*, 4 F. R. D. 108 (W. D. N. Y. 1944), it was held that the nondisclosure regulation of the Department of Justice "does not" prevent the court from ordering the production of files of the Department of Justice in all cases. There may be certain of such files which are entirely privileged and others which are not".

In *Bank Line v. United States*, 163 F. 2d 133 (2nd Cir.), Judge Augustus Hand said: "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies, which is at the base of our institutions. The existence of government privileges must be established by the party invoking them and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual." (163 F. 2d 133 at 138). This statement by Judge Hand is in line with what was stated by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. He said that "Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete

public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can."

341 U. S. at p. 172.

The determination of whether the information sought is privileged is not to be made by the Attorney General. That question is to be determined by the court and not the Department of Justice. In *Zimmerman v. Poindexter*, 74 F. Supp. 933, 935 (Hawaii 1947), the court said the "clear mandate that all executive regulations be not inconsistent with law" circumscribes the power of the entity prescribing the regulation under consideration, and operates to make the applicability and enforceability of a specific department regulation a judicial question for ultimate decision by the court".

This point is further supported by the holding in *Griffin v. United States*, 183 F. 2d 990 (D. C. Cir.), where the court said:

"However, the case emphasizes the necessity of the disclosure by the prosecution of evidence that may reasonably be considered admissible and usable to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. The United States Attorney is the representative not of an ordinary party to the controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not it shall win a case, but that justice shall be done. *Burger v. United States*, 295 U. S. 78, 88."—183 F. 2d at p. 993.

Attorney General Clark recognized that the question of privilege is one for the court to decide rather than for the Attorney General when he, in his Supplement Number 2, June 6, 1947, which clarified Order No. 3220, among other things, wrote: "If questioned the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its

materiality in the case and whether in the best public interests the information should be disclosed."

Recently the Attorney General, however, has instructed all United States Attorneys and all members of the Federal Bureau of Investigation to refuse to produce the F.B.I. statement, even when requested and ordered by the courts. See Order No. 3229 (Revised), dated January 13, 1953, revoking Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3 and 4 thereto, dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the F.B.I. report to be submitted to the court for a determination of whether it should or should not be produced.

This new policy established by Attorney General McGranery is contrary to the established rule of law announced many years ago by this Court. In considering the claim of privilege against producing documents containing trade secrets it has been held that it is a judicial decision for the court to make. Mr. Justice Holmes in *E. I. duPont de Nemours Powder Co. v. Masland*, 244 U.S. 100, said: "... and if ... in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions the revelation should be made." (244 U.S. at 103) The same rule ought to apply in the determination of the privilege urged by the Government.

Additional cases where the Government has been required to produce documentary evidence are *United States v. Grayson*, 166 F. 2d 863 (2nd Cir.); *United States v. Coplon*, 185 F. 2d 629 (D.C.D.C. Criminal No. 381-40, 1949); and *Cresmer v. United States*, 9 F. R. D. 203 (E. D. N. Y. 1949).—See 59 YALE LAW JOURNAL 1454 (1950).

It is submitted that the F.B.I. report was not privileged and that the constitutional rights of the registrant were violated when it was not produced to him by the hearing officer in each case.

Three

The judgments of the court below in each case should be affirmed for failure by the appeal board to give respondents a lawful classification and because the report of the hearing officer and the recommendation of the Department of Justice violate the regulations, the act and due process of law.

A. Nugent was deprived of his rights on appeal by the hearing officer's making an arbitrary and capricious report against Nugent, in his failing to give Nugent at the hearing a chance to offer material evidence on important matters and in his secretary's telling Nugent prior to the hearing that he need not bring witnesses to the hearing.

The hearing on appeal provided by Section 6 (j) of the act and Section 1626.25 of the regulations should be a full and fair one if the appeal is to mean anything. The instructions should be adhered to by the hearing officer if the registrant is not to be confused.

The hearing officer refused to allow Nugent to give evidence of his conscientious objections to war or when he adopted a full conscientious objector status. This turned the hearing into a mere pretext of a hearing and deprived Nugent of substantial rights. Besides, the hearing officer struck out material testimony of Nugent concerning his religion. This was violative of due process.—See *Kwock Jan Fat v. White*, 253 U. S. 454, 459, 463, 464.

The Government argues that the report of the hearing officer was only a recommendation. But a recommendation must be honestly made, so that the matter can be fairly considered by the appeal board that must make the decision. If it were not meant to have a full and fair hearing or if the report of the hearing officer did not matter anyhow, then why was such a careful provision made for an appropriate inquiry and hearing in Section 6 (j) of the act? Congress wanted to protect a registrant on appeal to the extent that he would have full opportunity to prove

his case and the recommendation of the hearing officer had to have relation to the proof adduced. The nature of the proof and report might well influence the appeal board.—See *Morgan v. United States*, 304 U. S. 1, 22, 23.

Consolidated Edison Co. of N. Y. v. N. L. R. B., 305 U. S. 197, held at pages 225 and 226:

"... and the companies also offered the testimony of two other witnesses. . . . The examiner refused to receive this testimony. . . . An offer of proof was made which showed the testimony to be highly important with respect to the reasons for the discharge. It was brief and could have been received at once without any undue delay in the closing of the hearing.

"We agree with the Circuit Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion."

Pursuant to instructions Nugent went to the office of the hearing officer to learn whether there was anything in the F.B.I. report that might tend to defeat his claim. The hearing officer was away on vacation but Nugent was told by the secretary to the hearing officer that the F.B.I. report was favorable, that he should have no trouble getting his desired classification and that he did not have to bring any witnesses.

This deprived Nugent of an effective appeal, just as did the local board in the case of *Estep v. United States*, 327 U. S. 114, when it withheld relevant documents from the appeal board.

Just as relevant evidence was withheld from Estep, so relevant testimony was withheld from Nugent, by advice of the hearing officer's secretary. The trial court took Nugent's evidence on this point but did not give it any weight, as it said that the secretary could not make a binding statement. This was error because the registrant was acting pursuant

to instructions and was lulled into a sense of security not to bring witnesses.

Concerning authority to bind the hearing officer by the secretary's statement, see 2 C. J. S. 1205, and *Hall v. Union Indemnity Co.*, 61 F. 2d 85, 91. The hearing officer went on vacation and left his secretary in charge of the office. She must be deemed to have had some authority or she could not have discussed the file and the F.B.I. report.

Nugent had intended to bring his minister to prove his claim before the hearing officer. This turned out to be a pivotal point, because the hearing officer in his report stated that no one gave evidence that Nugent had adopted his views before the Korean situation.

A person appealing a classification should be given an opportunity to have an effective appeal by producing his witnesses. This was provided for in the instructions.

It cannot be said that Nugent had a full and fair hearing when he was deprived of an important witness by the representation of one in charge of an office, however well intentioned the representation may have been. See *Chin Yow v. United States*, 208 U. S. 8, 11, 12.

The recommendation of the hearing officer in the *Nugent* case is, therefore, grounded on arbitrary and capricious conclusions. The recommendation on one point is specifically impeached by the record. It shows that Nugent failed to indicate affiliation with a church with conscientious objection to war. The record shows that Nugent became a member of the Associated Bible Students, March 13, 1945. [N 36]

The record also shows conclusively that the Associated Bible Students are a pacifistic group. They have conscientious objections to participation in war, both combatant and noncombatant service. These objections are grounded upon the Bible and belief in a Supreme Being. They involve duties superior to those arising from any human relation, governmental obligations included. [N 38-45]

While the records show that Nugent had "church affiliations", reliance upon church affiliations as a necessary factor is wrong. Church membership is required by neither the act nor the regulations. Relationship to the Supreme Being can come from sources outside of church memberships. The individual may study religion alone and mold his conscience. The mere fact that the hearing officer relied on church affiliations is just another proof that he proceeded arbitrarily and capriciously.

An erroneous statement was made by the hearing officer. He chose to defy the record. The statement flies into the teeth of the evidence which shows without dispute that Nugent was a conscientious objector since 1945. Yet the hearing officer has the audacity to say that Nugent failed to take affirmative actions prior to the national emergency. He also says that Nugent failed to make any affirmative statements about his conscientious objector status before the national emergency. Nugent had talked to Nichols, a soldier. This man would have testified about his conscientious objections. Nugent also would have brought his presiding minister to testify before the hearing officer. Neither of these witnesses was brought by Nugent because he was misled. He wanted to use the witnesses to corroborate his claim. The secretary of the hearing officer told him that it would be unnecessary to bring witnesses to corroborate his claim. [N 12-14] . 9.

The conclusion of the hearing officer is impeached by the letter of the Attorney General to the appeal board. He found that Nugent was religious and attended church meetings regularly (in 1948). This is additional proof that the hearing officer was arbitrary and capricious.

A definite weak spot shows up in the Government's derogation of Nugent's claim for classification as a conscientious objector. The Government, relying on the report of the hearing officer, says that Nugent was not qualified by "church affiliations, religious beliefs, or statements or affirmative actions made prior to the national emergency".

The Government then implies that none of this information was taken from the F.B.I. report. The fact that the hearing officer made no reference specifically to the F.B.I. report on these points does not prove the inference that it did not come from the F.B.I. report.

Much weight is given by the Government to a statement made by the hearing officer in the *Nugent* case. Mr. Gallagher said that Nugent's "references had not made a favorable impression". Just how the references made no favorable impression to the hearing officer is unknown. The references did not ~~go~~ to the hearing. No testimony was given by them orally. They were not interviewed by the F.B.I. agent. The unfavorable impression gained by the hearing officer came through the F.B.I. report. This shows positively that there was unfavorable evidence in the report relied upon by the hearing officer against Nugent.

The Government repeats the conclusion of the hearing officer that the religion of Nugent called "for little effort". This statement by the hearing officer was derogatory. It was an unfavorable conclusion. No evidence that Nugent's religion was easy-going was called to his attention. This "little effort" theory of the Government and the hearing officer came from the F.B.I. report, obviously. How can the Government, in the face of this, say that the F.B.I. report was not derogatory or that it was not developed at the trial to be unfavorable? The "little effort" argument is damaging. It came from the F.B.I. report. It does not appear in any of the draft board records. None of the facts recited by the hearing officer justify this "little effort" conclusion.

The law laid down in *United States v. Kauten*, 133 F. 2d 703, 708, was violated by the finding that Nugent did not qualify as to religious affiliations in order to be a conscientious objector to war.

It is needless to labor the point that one does not have to belong to a religious sect or organization to be recognized

as a conscientious objector. Yet the hearing officer held that Nugent did not qualify as to religious affiliation.

The *Kauten* holding was adhered to in *United States ex rel. Phillips v. Downer*, 135 F. 2d 521. Both are Second Circuit cases.

Even if church affiliation were required, the entire record shows such affiliation with the Associated Bible Students. The finding is, therefore, without basis in fact. This case should be sent back for error of law. That was done in *United States ex rel. Reel v. Badt*, 141 F. 2d 845 (2d Cir.), where the court said, at page 847: "In other words, he reached a conclusion as a matter of law which was directly opposed to our decision in *U. S. v. Kauten*, 133 F. 2d 703."

The conduct of the hearing and the report of the hearing officer show prejudice against Nugent. Prejudice by a hearing officer against a party has no place in an administrative proceeding. Yet the record shows this to be the case here. The refusal to let Nugent give evidence and the striking out of, much of his testimony has already been fully covered.

In his report the hearing officer said this about Nugent: "From the impressions gleaned as to this registrant, he is apparently shiftless, lazy, somewhat of a moral weakling—has unusual motion in walking, talking and other mannerisms which give him the appearance of being somewhat if not definitely effeminate." [N 46-47]

In addition, the hearing officer reported: "Registrant's belief seems to be a free and particularly easy belief and religion, calling for little effort and practically no sacrifice." [N 46]

There was nothing in the record to justify any of the remarks adverted to in the two preceding paragraphs. What is more, these things had nothing to do with Nugent's conscientious objection to war and were calculated to prejudice the appeal board against him.

In addition, the hearing officer reported: "As to his

sincerity, the references he produced failed to make favorable impression, and most of them were Conscientious Objectors themselves or members of the same Bible Society." [N 46] This kind of finding is not based on reason but is arbitrary. A member of a Bible society should be expected to produce proof from fellow members of that society. Besides the proof shows that non-members gave favorable evidence for Nugent. [N 48]

The hearing officer did not let Nugent state why he would not salute the flag. This was prejudicial before the appeal board. [N 19]

The hearing officer reported that no statements or actions were attested to by anyone on behalf of Nugent prior to the national emergency. [N 48] But there was testimony that he had spoken to persons, particularly to one Nichols, then in the army, but the hearing officer did not try to fix the date. This report was arbitrary. [N 14]

The hearing officer made a finding that the claim was not founded on truth in fact. This is an arbitrary finding and does not express a reasoned conclusion. The finding was made in the paragraph following criticism of Nugent's personality and in the paragraph in which the rule of the *Kauten* case was flouted. [N 47]

The minutes of the hearing, Government's Exhibit 2-J, show that the hearing officer asked Nugent a question that tended to and did confuse Nugent. The fourth query from the end shows that this question was asked:

• "Q. Would you be willing to drive an ambulance in Korea if you didn't have to swear allegiance to the flag?"

"A. No,—yes,—no.—" (See page 96 of the original record filed with this Court.)

Nugent took this question to refer to the army at first and then thought it could mean to drive for a civilian agency because there was no allegiance to the flag, a thing impossible in the army.—See also the closing questions at the hearing to the same effect.

The hearing officer did not stop at the things already mentioned. He even criticized Nugent's spelling in the questionnaire. [N 46] That had nothing to do with his conscientious objection, but the hearing officer still occupied himself with such a flimsy matter.

The facts that evidence was stricken from the record, that the F.B.I. report was never adverted to and that Nugent was told not to bring witnesses are sufficient to justify a finding that the prejudicial statements of the hearing officer had a material effect upon Nugent's classification by the appeal board. And this is true even though the report of the hearing officer is but a recommendation.

B. Packer was deprived of his rights on appeal by the arbitrary and capricious holding of the hearing officer.

This is what the hearing officer erroneously concluded in his report, after stating Packer's training in the Hebrew faith: "Registrant received religious training in a faith which is not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form." [P 42]

Section 6 (j) of the Selective Service Act of 1948 was misinterpreted by such conclusion. This law makes no distinction between religions. All religions that qualify under the law must be recognized.—See *Niznik v. United States*, 184 F. 2d 972, 974 (6th Cir.).

The holding in *United States v. Everngam*, 102 F. Supp. 128 (D. C. W. Va.) is in point. In that case the registrant was a Catholic. The hearing officer, before whom he appeared (the same one before whom Nugent appeared)

found that, because the Catholic Church⁴ did not have conscientious objector doctrines, Everngam was not entitled to the classification. The court held that this was arbitrary and capricious. The court found that the law protected the conscience of a person regardless of the beliefs of the religious organization to which he belonged. The court said:

"It does not appear that any member of the appeal board felt himself bound by this report and recommendation or how far, if at all, it influenced the decision of the appeal board, but that is not enough. The report and recommendation was transmitted to the appeal board to use as an advisory opinion, and was considered and used (as the regulations require) by the appeal board in its subsequent classification of the defendant. Under such circumstances the prosecution was bound to prove that such invalid report and recommendation of the hearing officer of the Department of Justice did not affect the decision of the appeal board, or any subsequent decision of the local board. No such proof was offered. And had such proof been offered, there is considerable doubt whether such proof would have cured the error, inasmuch as the report and recommendation of the Department of Justice is an important and integral step in the conscription process, for the protection of the registrant, as well as the government. The registrant is entitled to have a report and recommendation that is not arbitrary. Without it he is denied due process of law. Had such a report and recommendation been made, who can say that the hearing officer would not have recommended a different classification, or that the appeal board would not have made a different decision?"—102 F. Supp. at p. 131.

The court acquitted Everngam. The holding in that case

⁴ The Association of Catholic Conscientious Objectors during World War II operated conscientious objector camps at Stoddard, New Hampshire; Chicago, Illinois; Warner, New Hampshire, and Owings Mills, Maryland.—Selective Service System, *Conscientious Objection*, Special Monograph No. 11, Vol. II, pp. 283-288, Government Printing Office, 1950.

is directly in point. It ought to be adopted by this Court.

According to the facts stated in the hearing officer's report Packer met the requirements of the law to be recognized as a conscientious objector to war. He was trained in the Hebrew religion and based his opposition to war upon such training and upon a belief in God. [P 42]

The requirement that a person be a member of a conscientious objector religious organization was in the 1917 act. The 1940 act did away with that requirement.—See *United States v. Kauten*, 133 2d 703 (2nd Cir.); *United States ex rel. Phillips v. Downer*, 135 F. 2d 521 (2nd Cir.).

The 1948 act did not restore all the requirements of the 1917 act. The demand that one be a member of a conscientious objector organization was not restored. The only thing that Congress took away from the 1940 act, by the provisions of the 1948 act, was that the conscientious objections, in order to be valid, must be grounded on a belief in the Supreme Being. The act excluded from the conscientious objector provisions political, sociological or philosophical beliefs. It confined the benefits to religious beliefs that imposed duties from God superior to those owed to the state.

Packer stated that his code of morals may well have stemmed from God. Not belonging to a religious organization, Packer wanted to show that religion may come from God, regardless of association or affiliation. He always emphasized his religion. This was in no way lessened by his assertion that he did not know "whether my code of morals will be considered of a religious nature". [P 41]

Nonaffiliation with a religious institution caused that remark, because Packer labored under the wrong idea that he would not be considered religious if he were not a member of a religious organization. The hearing officer fell into the same error.

The hearing officer wrote Packer informing him that one of the objections to his claim for conscientious objector classification was that he was not a member of a religious

sect or organization. This point was pursued by the hearing officer at the hearing when he said, "do you mean that?" It was also stated as a fact in the report of the hearing officer. [P 44]

It is fair to assume that this objection of the hearing officer was one of the factors that motivated his conclusion: "The present case in the opinion of the hearing officer is one in which the registrant has failed to establish by sufficient evidence that his opposition to war arises from religious training and belief." [P 42]

While Packer did say that he was no longer a member of a religious institution, because he ~~could not~~ go along with the ritual, he also said that he considered himself religious. [P 44] The trial court agreed that substance is the important thing in religion. [P 37]

Much could be written to show that there is a minority viewpoint in the Hebrew faith that teaches conscientious objection to war. Some of the teachings will be illustrated to show what these views are. They are enough to bring Packer within the minority viewpoint of non-peace church members and trainees spoken about in Special Monograph No. 11, Vol. I on *Conscientious Objection* by Selective Service System.

The 1931 *Yearbook of the Central Conference of American Reform Rabbis* says that "it is in accord with the highest personal interpretation of Judaism conscientiously to object to any personal participation [in warfare]".

The Rabbinical Assembly of America, being the Conservative Rabbinate of America, has had a standing committee on conscientious objectors to war for the past eleven years and this is its position:

"We recognize the right of the conscientious objector to claim exemption from military service in any form in which he cannot give his moral assent, and we pledge ourselves to support him in his determination to refrain from any participation in it."

The Jewish Reconstructionist Movement has this plat-

form: "Conscientious objection to participation in war on the part of Jewish pacifists who base their objection on adherence to Judaism should not affect their good standing in the Jewish community."

The following is part of an article in the *Universal Jewish Encyclopedia*, Vol. 8, page 341:

"The sacred literature of Judaism arose in eras antedating the conscious formulation of any specific pacifist philosophy. Elements of pacifism appear, nonetheless, in that literature, and a spirit of pacifism colors various Biblical, Talmudic, Midrashic and cognate utterances."

Arnold Toynbee, the renowned historian, in his *Study of History*, Vol. 5, page 75, says:

"What was done for Jesus' followers by the Crucifixion was done for Orthodox Jewry by the destruction of Jerusalem in A. D. 70. . . . Rabbi Johanan ben Zakkai independently took the momentous decision to break with the tradition of militancy which Juda Maccabaeus had inaugurated. . . . In act and word Johanan ben Zakkai was proclaiming his conversion from the way of violence to the way of gentleness; and thru this conversion he became the founder of a new Jewry which has survived (down to the present day). . . . The secret of this latter-day Jewry's extraordinary survival power lies in its persistent cultivation of the ethos which Johanan ben Zakkai has bequeathed to it."

There is a Jewish Peace Fellowship, founded in 1941, to promote a nonviolent way of life among Jews. It teaches that war negates the Fatherhood of God and the brotherhood of man. Being a national organization, it has a membership, including orthodox, conservative, and reform rabbis and Jewish educators. It gives advice to Jewish conscientious objectors, among whom more than one hundred were recognized under the 1940 and 1948 acts.

The Government refers to the recommendation of the Department of Justice finding that Packer's convictions did not result from religious training and belief, but were

based upon "philosophical . . . grounds or upon a personal moral code". In fact, Mr. Peyton Ford for the Department of Justice made his findings upon three opposite conclusions merely to follow the wording of the statute. (The Government's brief has merely set forth two of these grounds, omitting the "sociological ground". A finding based upon a conclusion that merely follows the wording of the statute for the purpose of bringing a party within the statute is not a legal finding.

The Government scrambles the evidence about Packer's beliefs. The Government says that his beliefs do not stem from the teachings of any particular person or book. Certainly his beliefs came from the Bible. The Bible is a book like any other book. His beliefs came from early training. It was not necessary for him to name some teacher or instructor. His beliefs came from God. He stated that they "stemmed from the Supreme Being". [P 64]

The Government asserts that Packer "failed to establish that his objection to war arose from religious training and belief". This, however, fails to take into consideration the fact that such a finding was based upon an erroneous conclusion of law made by the hearing officer and his report. The illegal conclusion of the hearing officer was that "registrant received religious training in a faith which is not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form".

It is, therefore, quite obvious that this finding is without any basis in the evidence. It was made in violation of law. It cannot be assumed from the evidence, therefore, that Packer lacked religious training. It is not necessary to be a church member in order to be a conscientious objector. It is not necessary that the religious organization have principles of conscientious objection to war. The protection extends to the individual irrespective of church membership. Today, more than seventy million people do not belong to any church in the United States. If Congress

had in mind making church membership a prerequisite for conscientious objection it would have said so. We cannot impute an intent to disqualify the conscientious objectors who may be found among the millions of nonchurch members. Without being a church member, a man can still be religious. It is not necessary for people to belong to a church in order to believe in God. There are countless millions of Bibles that are possessed by people who are not church members. A man can believe in God and in the Bible without having been reared in or being a member of a religious organization.

The Government does not properly state the source of Packer's religious guidance. The statement of facts made by the Government discolors the truth. It says that Packer formed his beliefs 'solely from the dictates of his conscience'. This is not true. Packer did not say that this came "solely" from his conscience. He stated that "my religious guidance is the dictates of my conscience". [P 63] The Government is bound by all the other proof including the handwritten statement made by Packer. In this he showed that he had religious training in the Jewish religion and that he had studied the "ten commandments". He said that this early training had "definite bearing on my subconscious". [P 64]

Much reliance by the Government is put on a statement by Packer. He said he did not know whether his code of morals would be considered religious. [P 64] This statement should be qualified by all the rest of the record. When before the hearing officer Packer testified that while he did not belong to any "particular religious organization", "I do consider myself religious". [P 44] The hearing officer added, "I have no doubt of that but I just want to straighten this out". [P 44] The real reason that Packer stated that he did not know whether or not his religious beliefs would be considered religious was because he did not know the law. He said he was uncertain about the requirements of the regulation, but that later he cleared them up. He said then it was that "I felt I come within the law in spite of the fact

that at the time of my objection I was not a member of any religious sect". [P 28] It is plain that the doubt in Packer's mind was not because of his religious belief but because of his misunderstanding of the law and the definition of a conscientious objector.

The Government tries to lift Packer out of the religious field and hem him in by the term "code of morals". His religious belief is not a moral code. His religious belief is founded on the Bible and his limited reading of it. He said that "we are put on earth by the will of God and by the will of God shall we depart". [P 68] This shows that his conscientious objections were not "his own highly developed moral conscience", but that they sprang directly from his belief in the Supreme Being. The obligations that he had, based on his belief in the Bible, are superior to those of any human relation.

The Government would have the Court believe that Packer waited two years to make his conscientious objector claim. It says that this is too long. Packer waited only one year after filing of his questionnaire. The delay was only one year. It was not two years. Packer could say nothing of his conscientious objector status at the registration. When he registered, all he did was to identify himself. The registration would not call for any statements about conscientious objector status.

The Government argues that Packer failed to check Series XIV in the selective service classification questionnaire. [P 58] No point can be made of this. The draft board, at the instance of the New York City Headquarters of Selective Service, mailed Packer the conscientious objector form. Packer explained to the court the reason why he did not check Series XIV. He told the hearing officer the reason he did not state in the questionnaire that he was a conscientious objector was that he did not know the procedure. [P 45] The reason for this was since he was not a member of a religious organization he did not know what the procedure was. He did not know he was entitled to

claim conscientious objection under the law. Packer said that he did not know that his rights would expire "after a certain time". He said he took advice of his friends not to urge the point at the time of filing the questionnaire because he might not pass the physical examination. [P 45] It is obvious that his failure to make a timely declaration of his conscientious objector status was no basis for the suggestion that he was not making the claim in good faith. The mistaken view of the law was not a mistake of fact. His erroneous view of the law could be no denial of the fact that Packer was a conscientious objector. He was, in fact, a conscientious objector. He merely failed to know the procedure to be followed by one not a member of a religious organization.

The test of training by association with the Hebrew faith should not be the determining factor, but the test of Packer's individual training and belief should control. This was the crux of the case and was overlooked by the hearing officer. That is the test applied in *United States v. Everngam*, 102 F. Supp. 128. That must be the test under the law and decisions. If it were not, the result would be that one could be a conscientious objector if he did not belong to a religious sect or organization, while one could not be a conscientious objector if he belonged to and were trained in a non-peace church. That would be a discrimination not intended by the law, as shown in the cases of *United States v. Everngam*, 102 F. Supp. 128, and *Niznik v. United States*, 184 F. 2d 972 (6th Cir.).—See also *George v. United States*, 196 F. 2d 445, 448.

Neither the Selective Service System nor Congress interpreted the law in such a way as to restrict it to those trained in peace churches. For an exposition of this view, see *Conscientious Objection*, Special Monograph No. 11, Vol. I, by Selective Service System, 1950, where at page 68, it is said:

"Objection a Personal Matter: The first of these issues

was whether to cover by the provisions of the Burke-Wadsworth bill conscientious objectors other than those who were members of historic peace churches. Such question came up in considering whether to include members of nonpacifist churches since they ordinarily would hold an individual or a minority viewpoint rather than a group or majority approach within their own organizations. This developed into the issue of whether the matter of conscientious objection should be made one at all of personal belief. Eventually the discussion turned to conscientious objectors who had arrived at their conclusions by reason of philosophical, political or economic reasoning. The final decision was to eliminate the church membership requirement entirely, but to qualify the provision by making it apply only to a person who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Since nothing in the record indicates that the Hebrew faith is what the hearing officer says it is, it must be assumed that the hearing officer took "judicial notice" of the teachings of the Hebrew faith. He could have consulted an ecclesiastical panel, as had been done in *United States v. Balogh*, 157 F. 2d 939 (2nd Cir.) and in *Eagles v. United States ex rel. Samuels*, 329 U. S. 304, but this was not compulsory. However, he chose to take "judicial notice". Under the circumstances, he should have told Packer that he was doing that, so that contrary proof could be made. Professor Wigmore points out the danger inherent in taking such notice without so stating at the hearing.—See *Wigmore on Evidence*, Vol. 6, page 257, section 1805; Vol. 9, page 541, section 2569.

Packer did not learn of the hearing officer's decision to take "judicial notice" until the classification by the appeal board and notification thereof by the local board. He never had an opportunity to overcome the wrong conclusion by proof. Under such conditions the expert testimony of

ferred by Packer at his trial was necessary to preserve his due-process rights.

Had the Rabbi been permitted to give expert testimony, the Government could have disputed any part with which it disagreed. A party should have the right at some point to offer his proof.

Ministers have been permitted to testify regarding marriage laws.—See *Wigmore on Evidence*, (3rd Ed.) Vol. 2, page 657, section 564, and Vol. 9, section 2569.

There is no good reason why an expert should not be allowed to prove what training one gets in his religion, if that will correct an erroneous interpretation by the Selective Service System. If it has the only right to produce proof or take judicial notice concerning matters of religious training and belief, then one could be classified arbitrarily with no chance to bring himself within the statutory exemption.

It is respectfully submitted that the recommendation of the hearing officer, that since Packer was not a member of a religious organization he was not entitled to the conscientious objector status, is arbitrary and capricious. It vitiated the entire proceedings.

The Government emphasizes the point (on page 3 of the petition for writ of certiorari) that Packer failed to sign the blank in Series XIV of the classification questionnaire, requesting the board to mail him a special form for conscientious objector. It is stated that Packer did not request the special form until October 20, 1950. (See page 3 of the petition.) To begin with, no weight ought to be given to this contention because it was argued in the court of appeals that respondent waived the claim because of these facts. This argument was rejected by the court below. [P 50-51] The Government has not assigned this holding as error. It has not presented this as one of its questions presented. The holding is binding on the Government and is the law of this case as far as the point is concerned.

The holding of the court below on this point was in accordance with the administrative interpretation placed upon the regulations by the New York City Director. [P 17-18, 72-73]

Local Board Memorandum No. 41, issued by National Headquarters, Selective Service System, Washington, D.C., dated November 30, 1951, as amended August 15, 1952, in paragraph 2 states that "a registrant should be considered to have claimed conscientious objection to war if he has signed Series XIV of the classification questionnaire . . . , or if he has filed any other written statement claiming that he is a conscientious objector".

A holding similar to the holding of the court below on this point was made on June 26, 1952, by the United States District Court for the Western District of Pennsylvania. —See *United States v. Clark*, 105 F. Supp. 613.

C. The denial by the appeal board of the conscientious objector status to Nugent and Packer was arbitrary, capricious and without basis in fact.

Section 6 (j) of the Selective Service Act of 1948 provides, among other things, that "Religious training and belief . . . means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code."

The documentary evidence submitted by each respondent establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation". This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code", but that it was based upon his religious training and belief.

There is no question whatever on the veracity of Packer. The Department of Justice and the hearing officer accepted his testimony. The appeal board did not raise any question as to his veracity. It merely misinterpreted the evidence. The question is not one of fact but one of law. The law and the facts irrefutably establish that Packer is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing Packer's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove Packer was a conscientious objector opposed to both combatant and non-combatant service) arbitrary, capricious and without basis in fact?

A decision directly in point supporting the proposition made in the *Nugent* case, that the I-A-O classification (conscientious objector willing to perform noncombatant military service) and the determination of the appeal board denying the I-O classification (full conscientious objector), are arbitrary and capricious is *United States v. Relyea*, No. 20543, United States District Court for the Northern District of Ohio, Eastern Division, decided May 18, 1952. In that case the district court sustained the motion for judgment of acquittal saying, among other things, as follows:

"I think it would have been more difficult for the court to find the act of the Board was without any basis in fact if the Board had classified this man as I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objections on the religious grounds as being truthful, but they attempted, and in my opinion without any basis in fact, to assert that while he was sincere and conscientious, that sincerity and conscientiousness ex-

tended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war in all its forms."

This was an oral opinion which is unreported. A printed copy of the stenographer's transcript of the decision rendered by Judge McNamee accompanies this brief.

A similar holding was made by United States District Judge in *United States v. Goddard*, No. 3616, District of Montana, Butte Division, June 26, 1952. The court, among other things, said:

"... after due consideration, the Court finds that the evidence is insufficient to sustain a conviction for the reason that there is no basis in fact disclosed by the Selective Service file of defendant upon which Local Board No. 1 of Ravalli County, Montana, could have classified said defendant in Class I-A-O, and therefore the said Board was without jurisdiction to make such classification of defendant and to order defendant to report for induction under such classification."

The above decision was a part of a judgment. No opinion was written. A printed copy of the judgment accompanies this brief.

This case is distinguished from the facts in *Head v. United States*, 199 F. 2d 337 (10th Cir.), where the I-A-O classification was held to be proper. In that case the facts showed that the registrant was a member of a church that believed it was right to perform noncombatant military service and that the I-A-O classification was satisfactory. Also facts were present in the *Head* case which impeached the good faith conscientious objections of the registrant. Here the undisputed evidence showed that the religious group that Nugent belonged to were opposed to both combatant and noncombatant military service and that the I-A-O classification was not satisfactory. Nugent was not impeached in his good faith. In the *Head* case there was no subpoena and demand for production of the F.B.I. report and there was no withholding of evidence, as in this case.

{ The *Nugent* case is similar to *United States v. Clare*, 108 F. Supp. 307 (S. D. N. Y. November 6, 1952), where (at the end of the opinion) the court held that the denial of the conscientious objector status was without basis in fact. In the *Clare* case the proof showed that he worked on a defense job and, notwithstanding this, the Assistant Attorney General overruled the adverse report of the hearing officer and recommended that Clare be classified as a full-fledged conscientious objector.

At the time of the final classification there was absolutely no evidence whatever in the draft board file that Nugent was willing to do noncombatant military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and non-combatant military service. The appeal board, without any justification whatever, held that he was a conscientious objector who was willing to perform noncombatant military service. When he first made his claim respondent suggested that he was willing to do noncombatant military service. He, at all times thereafter, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

The hearing officer and the appeal board make no explanation whatever of the reasons for rejecting the claim that Nugent be placed in Class IV-E as a conscientious objector to participation in both combatant and noncombatant military service:

The hearing officer and the appeal board, without any grounds whatever, compromised Nugent's claim for total conscientious objection and awarded him only partial conscientious objector status. This was directly contradictory to the testimony that Nugent had given to the hearing officer. Respondent explicitly stated in his papers he objected to going into the army.

It was arbitrary for the hearing officer and the appeal board to grant only part of Nugent's claim and his testi-

mony and reject the balance. The board of appeal classified Nugent as one who was willing to serve in the armed forces and perform noncombatant service. This finding flies directly in the teeth of the evidence and the sworn written statements submitted by Nugent. It defied and flouted the law.

The hearing officer and the appeal board should have accepted Nugent's claim for exemption as a total conscientious objector or rejected it. The hearing officer and the appeal board had no authority to compromise his claim. He either was telling the truth and was entitled to IV-E classification (or I-O) or else he was telling a lie and deserved a I-A classification. If the appeal board and the hearing officer demurred to his evidence it accepted the facts and made a determination that was without any basis in fact, arbitrary and capricious.

It cannot be held because Nugent stated in his questionnaire he wanted the I-A-O classification that he was bound by it. It should be remembered that the proof showed he had grown in his religion from the time of his registration. This constituted a change in his status. The court below found a bona fide change at the time of filing his questionnaire from an objector to combatant service, (willing to do noncombatant service) in the army to a full-fledged objector to all kinds of military service at the time of the hearing.

It is the law that one not exempt at a previous time may later become exempt. For instance a lawyer may not be deferred at the time of filing a questionnaire. Yet if he gets elected to the bench before classification his change in status entitles him to the newly acquired deferment. (See *Hull v. Stalter*, 151 F. 2d 633, at page 635 (7th Cir. 1945).) So it is the duty of the court to determine the status of Nugent at the time of his last classification when he claimed the full conscientious objector status, rather than at the time of first filing his questionnaire when he claimed only partial conscientious objection.

There are no cases by the courts of appeals on this question that are directly in point. There are decisions of the courts of appeals involving cases which presented only the question of whether each registrant was a minister within the definition of the term in the Selective Service and Training Act of 1940. There is a district court opinion that bears directly upon the question involved here. This is the unreported oral opinion rendered by Judge Clifford from the bench, sitting in the United States District Court for the District of New Hampshire, in cause No. 6216, *United States v. Konides*, March 13, 1952. In that case the defendant was denied the conscientious objector status. The facts, as far as the evidence appearing in the file on the subject of conscientious objection is concerned, were identical to the facts in this case. A printed copy of the stipulation of fact and oral opinion rendered by Judge Clifford is here referred to and accompanies this brief.—Compare *United States ex rel. Phillips v. Downer*, 135 F.2d 521, 525-526 (2d Cir.); *United States v. Grieme*, 128 F.2d 811 (3rd Cir.).

A case closely in point here is *United States v. Graham*, 109 F. Supp. 377 (D. C. Ky. W. D. Dec. 19, 1952), where the defendant was a member of the National Guard at the time of his registration and the filing of his original questionnaire. The board had deferred him because of his membership in that military organization. Following this he became one of Jehovah's witnesses. He later filed claims for classification as a minister of religion and as a conscientious objector. The case was appealed to the National Selective Service Appeal Board, which classified him in Class I-A. The classification was set aside as arbitrary and capricious. Read at page 378.

The pivotal decision for the determination of issues raised in draft prosecutions is *Estep v. United States*, 327 U. S. 114. The Supreme Court there itemized certain things committed by a draft board "that would be lawless and beyond its jurisdiction". (327 U. S. at page 121) Read what

The Court said about provisions of the act that make determinations of draft boards "final" at pages 121-123.

In note 14 of the *Estep* opinion (at page 123) the Court says that the scope of judicial inquiry to be applied in draft cases is the same as that of deportation cases, and the Court cited *Chin Yow v. United States*, 208 U.S. 8; *Ng Fung Ho v. White*, 259 U.S. 276; *Mahler v. Eby*, 264 U.S. 32; *Vajtauer v. Commissioner*, 273 U.S. 103; *Bridges v. Wixon*, 326 U.S. 135. In this note the Court added that "is also the scope of judicial inquiry when a registrant after induction seeks release from the military by *habeas corpus*". The Court concluded note 14 explaining the scope of judicial review by citing the opinion of the Second Circuit in *United States v. Cain*, 144 F. 2d 944 (2d Cir. 1944). —327 U.S. at page 123.

In the *Estep* case, the Court said that, in reviewing draft board files, judges are not to weigh the evidence to determine whether the classification was justified. A court weighs the evidence only when there is some contradiction in the evidence. There must be some dispute before this burden falls upon the court to determine whether the classification is justified. The Court added, however, that if there is no basis in fact for a classification after a review of the file by a court, it would be the duty of the court to hold that the classification was beyond its jurisdiction. —327 U.S. at page 122.

There is no basis in fact for the classification in each of these cases because there are no facts that contradict the documentary proof submitted by each respondent. The facts established in his case show that he is a conscientious objector to noncombatant service and, therefore, the classification given is beyond the jurisdiction of the boards.

It is respectfully submitted that, if the Court finds against the respondents, the judgment of the court below, nevertheless, must be affirmed. The reason is that the convictions should have been reversed in each case on other

grounds. The judgments of reversal are correct and should be affirmed for the reasons above discussed.—See *United States v. Ballard*, 322 U. S. 78, 88.

The grounds presented above under Point Three of the argument were raised in the trial court. They were properly presented to the court below. Under the practice followed in the Court the questions of law presented under this point should be considered and determined in favor of the respondents. Should the Court not consider, however, whether the judgments should be affirmed on other grounds, then it is suggested that the judgments ought to be vacated and the cases remanded to the court below for further consideration of these questions.

Four

Reversible error requiring a new trial was committed by the trial court in the Packer case by quashing the subpoena duces tecum issued to compel the production of the F.B.I. report at the trial.

Conclusion

It is obvious from the study of the legislative history, a reading of the act and a consideration of the Selective Service Regulations that procedural due process is one of the essentials to be followed by the Government in the fair and just selection of registrants for service under the act. This requirement of procedural due process, not having been accepted as far as the Department of Justice is concerned, makes the department liable also to allow due process. There are no reasons why the confidential and privileged nature of the F.B.I. report should prevail over

the requirement of procedural due process, inasmuch as there is no danger to the national security involved in permitting the report to be accessible to the registrant and the appeal board, as well as on any appropriate judicial demand.

While freedom of conscience, guaranteed by the First Amendment, does not make mandatory exemption, it has been historically considered by Congress to provide, as a grant, for freedom from military service by conscientious objectors. The case of the Quakers is well known. (See *Girouard v. United States*, 328 U. S. 61.) Even though the Constitution does not exempt conscientious objectors, still the statute provides for their exemption from military service. The fact that the determination is to be made by the Selective Service System, aided by the Department of Justice, does not mean that the registrant claiming that status can be denied procedural due process. It is a uniform practice to require administrative agencies to obey procedural requirements demanded by the Fifth Amendment even when there is no explicit requirement therefor in the administrative statute or regulations.

It is submitted that use of the F.B.I. report and the failure to produce it at the hearing conducted by the hearing officer, so as to enable each respondent to rebut the adverse evidence there, constitute a denial of procedural due process. Respondents say that there are other reasons for the affirmance of the judgments. These have been set forth above.

The judgments should be affirmed. The respondents should remain discharged. In the alternative the judgments should be vacated and the cases returned to the court of appeals for further proceedings.

Respectfully submitted,

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Counsel for Respondents

April, 1953.

Appendix A

(Letters from Chairman, Appeal Board for the State of Connecticut, to Department of Justice requesting F.B.I. report in *Pekarski* case, No. 221, October Term 1952, United States Court of Appeals for the Second Circuit.)

APPEAL BOARD FOR THE STATE OF CONNECTICUT

49 Pearl Street, Room 707
Hartford 3, Connecticut

May 5, 1951

The Honorable Adrian W. Maher
United States District Attorney
135 High Street
Hartford 1, Connecticut

Re: John Pekarski
S. S. No. 6-21-30-26
Local Board No. 21
Rockville, Connecticut

Dear Mr. Maher,

On January 19 of this year, the cover sheet of the above-named registrant was transmitted by us to you for investigation and report, in pursuance of Section 6 (j) of the Selective Service Act of 1948, because the registrant was claiming to be conscientiously opposed to both combatant and noncombatant training and service. Under date of February 28, 1951, you informed us that the Federal Bureau of Investigation had completed its investigation of the case; and that you were that day forwarding the file and the covering report to Hearing Officer Nathan Aaron, at Hartford, for hearing. (Actually, this letter related to the case of Adam Samuel Michalik, S. S. No. 6-21-26-41, as well as the registrant.)

Under date of April 27, 1951, the Department of Justice, acting by Deputy Attorney General Peyton Ford, returned the cover sheet to us, along with the report of Mr. Aaron, who recommended that the registrant's objections "be sustained and that he not be inducted into the armed forces." This report bears the date of April 19, 1951. In the accompanying letter of transmittal, i.e., that of April 27th, Mr. Ford said that his Department concurred in Mr. Aaron's recommendation; and, more particularly, it was recommended that the registrant "be placed in Class IV-E and deferred." This letter in no way discussed the facts on which classification would be predicated, nor was the investigative report of the Department of Justice enclosed.

At our meeting of May 3rd, this case came before our Board for consideration. In view of the amendment to classification procedure made after the date we transmitted the cover sheet to you, and, more particularly, amendment to Section 1623.2, it became necessary for us to consider the registrant's claim of being a minister ahead of his claim of being a conscientious objector (nowadays such a claim would be considered by us before we undertook to transmit the cover sheet to you, indeed it would not be transmitted at all except as the ministerial claim were rejected.) At our meeting of May 3rd, we had considered and we had rejected (four to nothing) the ministerial claim made by the registrant. It was then in order, of course, for us to consider the conscientious objection claim. This we discussed at length but, in the end, concluded that we needed more information and, more especially, more light from the Department of Justice, the Hearing Officer included. Accordingly, the cover sheet is again transmitted to you in the hope that such information will be given, even though further investigation and further hearing prove necessary. You will appreciate, we are sure, the desirability of promptness in this matter, considering that the appeal is already several months old.

To our minds, the report of the Hearing Officer is not only sketchy but was composed under a misapprehension as to the objective of an investigation. In his conclusion, Mr. Aaron makes it plain, by implication if not expressly, that a member of the religious order known as *Jehovah's Witnesses* is, by that very fact alone, a conscientious objector to both combatant and noncombatant training and service, provided only that he be a *bona fide* member; indeed, Mr. Aaron predicates his recommendation on that assumption. If this is true, then all *bona fide* members of this religious sect would be automatically deferred as conscientious objectors except as they might call for deferment as ministers. One may wonder whether or not, by inference, the Department of Justice is taking the same stand?

Up to now anyway, it has never been our belief or understanding that a *bona fide* member of any religious sect or order was entitled, by the mere fact of such membership, to be classified in either Class IV-E or Class IV-D. Were that true, then Selective Service would, in effect, be giving group deferments, which would certainly be contrary to its normal policy and operation. Moreover, we have never understood that a member of the religious order of *Jehovah's Witnesses* was determined, automatically, to be a conscientious objector. It has been our understanding that this religious order has left to individual conscience the question of conscientious objection even though, as to ministerial exemption, it evidently has and does take the position that all of its members are ministers. (While we have classified one member of this order in Class IV-D, we have not been able to cling to the belief that all members in good standing were ministers within the meaning of the law and, therefore, entitled to placement in that class. As you have already seen, we do not feel that the registrant in this case was entitled to be placed in Class IV-D.)

It seems to us that more attention should have been paid to the text of Section 6 (j) of the Selective Service Act

of 1948; and that we should have been provided with the report, both as to basic facts and conclusions, which would enable us to determine whether or not this particular registrant is a conscientious objector within the meaning of the law.

We should also like to have before us the investigative report of the Department of Justice. The reasons for this are evident, we think, but, apart from that, we have discussed the subject at some length in recent correspondence and consequently feel there is no need here to recapitulate.

Very truly yours,

APPEAL BOARD FOR THE
STATE OF CONNECTICUT

By

Wallace W. Brown, Chairman

WWB:ee

CC to: Deputy Attorney General Peyton Ford
State Headquarters for Connecticut

APPEAL BOARD FOR THE
STATE OF CONNECTICUT

49 Pearl Street, Room 707
Hartford 3, Connecticut

September 17, 1951

(Dictated Sept. 15)

Re: John Pekarski
SS. No. 6-21-30-26
Local Board No. 21,
Rockville, Connecticut
And Fred Carmine Forcellina
S. S. No. 6-17-31-226
Local Board No. 17
South Norwalk,
Connecticut

The Honorable Peyton Ford
Deputy Attorney General
Department of Justice
Washington 25, D. C.

Dear Mr. Ford,

Under date of September 6, 1951, you returned the cover sheet of the registrant first named above to us, with an additional statement from the Hearing Officer, Mr. Nathan Aaron, we having requested further facts and elucidation from him through a letter, dated May 5, 1951, to our District Attorney here, the Honorable Adrian W. Maher; and, under date of September 11, 1951, you returned to us with recommendation, the cover sheet of the second named registrant. I write about these two cases together because they demonstrate what I feel is a failure to supply our Appeal Board, in a full sense, with the sort of information which we believe the Department of Justice could and should supply to us within the intention of Section 6 (j) of the Universal Military Training and Service Act and

which would assuredly be of particular value to us in determining appeals based on claims of conscientious objection; also it seems to me that the Hearing Officer, the same man in each instance, has been under a misapprehension as to his own role, at least in cases involving Jehovah's Witnesses, with the result that his findings and recommendations are of considerably less usefulness than they ought to be.

By now, our expressed desire for an extended finding of the subordinate facts, including your investigative report or a copy of it, will have become an old refrain in your ears. You will remember that I have expressly stressed the desirability of having your investigative report or a copy of it, since both Hearing Officers in this State have been inclined towards giving excessively skimpy recitals of the subordinate facts. Also, as I have said to you before, we value the recommendations of your own Department and of the Hearing Officer (with which, in our experience, your own recommendations have invariably coincided); yet, at the same time, recommendations made to us are merely opinions or conclusions as to what our decisions should be and we can not, in a proper exercise of our functions, do other than draw our own conclusions—which, perforce, must largely stem from the underlying evidence and subordinate facts.

In a letter or two, you have shown an appreciation of the point of view above set forth, although declining to send us your complete investigative reports on the ground that they are "confidential". Even so, you did undertake to send us abstracts or digests of your investigative reports, and you have, in fact, done so in more than a few instances. Despite this, the cover sheets of the two registrants, above-named, have been returned to us by you without any material whatever from the investigative reports which must have been made. The months which have been consumed in having the Department of Justice investigate

and report on these cases have yielded nothing but the skimpiest sort of statements from the Hearing Officer and your seemingly routine endorsements of his recommendations.

As to the value of your investigative reports—where we have had the benefit of them or digests from them—I think I can say from recollection that they were decisive in our deliberations in at least two recent cases; and, in this connection, I may say that, in our opinion, those investigative reports did not jibe with the recommendations made by the Hearing Officer.

In our letter of May 5, 1951, above referred to, I particularly made it plain that we would like to have material from the investigative report, as well as further statements and finding from the Hearing Officer. One copy of that letter was sent to you directly, so it presumably is in your files. And, in a letter dated May 28, 1951, to Mr. Maher, with a copy to us, you commented on our letter.

In this same letter of May 5, 1951, about Registrant Pekarski, I said that Mr. Aaron's conclusions were apparently misconceived because he felt that, if a man were a *bona fide* member of the Jehovah's Witnesses sect, he was automatically entitled to be placed in Class IV-E. We rejected Mr. Aaron's views on this because we did not feel, and do not feel that they are sound. I never recall having seen a statement from this sect's headquarters that all Jehovah's Witnesses are *ipso facto* conscientious objectors; on the contrary, it has been evident from several cover sheets that the matter of conscientious objection is for the conscience of the particular individual registrant. Moreover, deferments can not be given in a blanket manner under the law. Each case must be judged on its own merits. If Mr. Aaron had been right in the first place, it would follow that all *bona fide* Jehovah's Witnesses should be placed in Class IV-E; and it would further follow that the same thing would apply to any other religious denomi-

nation or sect which adopted a conscientious objection fallacy. Jehovah's Witnesses *do* claim that all of them are ministers, and they have frequently sought placement in Class IV-D (as is true in the instant cases) on that account. We have never accepted that contention, and I notice that it was specifically rejected by the Circuit Court of Appeals (Fourth Circuit) in the very recent case of *Martin v. United States*.

We had hoped that Mr. Aaron would make a new and thorough-going statement, perhaps after fresh hearing, on the subject of the registrant's own individual beliefs. However, in a one-page supplement dated August 28, 1951, he merely undertakes to "clarify" his conclusion of last April 19th by saying that he "feels that the registrant's conscientious objection to war in any form is a result of his religious training and belief and not merely as a bona fide member of the Jehovah Witnesses". He then goes on to say, relative to a subject not before him, that in his opinion the registrant did not qualify for a deferment as a minister. It is manifest that the Hearing Officer gave this matter the most cursory sort of attention, and without benefit of further investigation or hearing; indeed, I am not sure that his present opinion varies at bottom from his former opinions. I think he may still be saying that the registrant individually is conscientiously opposed to war in any form because, in training and belief, he is a Jehovah's Witness.

As to Forcellina, Mr. Aaron again enters the field of ministerial deferment, which he applied to the registrant in view of his ultimate recommendation that the registrant be classified in Class IV-E. Mr. Aaron's entire statement, including his conclusions and recommendations, is contained in a double-spaced document running a trifle over one page, and his actual recital of the facts is contained in a paragraph of eight and one-half lines.

Also as to the Forcellina case, you say in the letter of

transmittal of September 9, 1951, that this Board should have but did not consider the ministerial appeal. Then you went on to say that, to avoid delay, you had gone forward with the conscientious objection investigation and report. Had we failed to consider the ministerial appeal, I am by no means sure that your investigation would have been in order from a legal standpoint, although I express no opinion on that point. The fact is, however, that we did consider the ministerial appeal and rejected it at our meeting of April 12, 1951. This action on our part was specifically mentioned in our letter of April 13, 1951, to Mr. Maher, a letter by which we transmitted the cover sheet to him. We do not understand why that letter is missing from the cover sheet. Certainly there ought to be at least a carbon of that letter in the cover sheet. I may mention that, in transmitting cover sheets to Mr. Maher, our clerk always sends a copy of the transmittal letter as well as the transmittal letter itself.

Very truly yours,

Wallace W. Brown, Chairman
Appeal Board for the State of Connecticut

WWB:ec

cc to State Director, General Novey

1.7

APPEAL BOARD FOR THE
STATE OF CONNECTICUT

49 Pearl Street, Room 707
Hartford 3, Connecticut

September 20, 1951

The Honorable Peyton Ford
Deputy Attorney General
Department of Justice
Washington 25, D. C.

Re: John Pekarski
S. S. #6-21-30-26
Rockville, Connecticut

And: Fred Carmine Forcellina
S. S. #6-17-31-226
South Norwalk, Connecticut

Dear Mr. Ford,

In transcribing Mr. Brown's letter of September 17, 1951, to you relative to the two above-named registrants, I made two errors.

Therefore, will you please make the following amendments on page three:

In the paragraph which is concluded on that page, the last word of the third sentence from the end should have been "policy" instead of "fallacy". The last clause should read: "... and it would further follow that the same thing would apply to any other religious denomination or sect which adopted a conscientious objection *policy*."

The first sentence of the last paragraph on that page should read: "As to Forcellina, Mr. Aaron again enters the field of ministerial deferment, which he *denied* to the

registrant in view of his ultimate recommendation that the registrant be classified in Class IV-E.

Please accept my apology for these inaccuracies.

Yours very truly,

Elizabeth Carrington, Clerk
APPEAL BOARD FOR THE STATE OF
CONNECTICUT

APPEAL BOARD FOR THE
STATE OF CONNECTICUT

49 Pearl Street, Room 707

Hartford 3, Connecticut

October 3, 1951

Re: John Pekarski

S. S. #6-21-30-26

Local Board #21

Rockville, Connecticut

And Fred Carmine Forcellina

S. S. No. 6-17-31-226

Local Board No. 17

South Norwalk, Connecticut

The Honorable Wm. Amory Underhill

Acting Deputy Attorney General

Department of Justice

Washington 25, D. C.

Dear Mr. Underhill,

I thank you for the summaries of your investigative reports in the above named cases, as transmitted with your letter of September 25, 1951, responding to my letter of September 17th to the Honorable Peyton Ford. I am sure they will prove helpful in our deliberations even though their gist may be but corroborative of the hearing

officer's recommendations as joined in by your Department. You refer to them as "additional summaries" but the files of these registrants disclose no previous ones. You speak of your practice of furnishing Appeal Boards "with information available in this office." I do not know how it has been with other boards but our own experience is variant, as demonstrated not only by the instant cases but also by the fact that we got no investigative reports at all, nor summaries thereof, until we strongly urged that we be given such; and, even now, we are never given your full investigative report in a case but only a summary or digest (with no identification of the investigator and seldom of the one interviewed)—and without so much as a representation that this summary covers all pertinent or important evidence. Considering that your investigations are made for the very purpose of enabling appeal boards to make correct classification of claimed conscientious objectors, and considering that in the World War II period appeal boards were given your full investigative reports in addition to truly comprehensive reports by hearing officers (at least in my recollection), I am baffled by the Department's stand under the current Act.

We are by no means seeking, nor have we sought, to instruct you. Clearly, our Board has no more jurisdiction to instruct you on the character of your reports than you have jurisdiction to instruct us on how we shall prepare our minutes. However, I do once more say that our *desire* is for comprehensive reports promptly rendered. And by "comprehensive reports" I mean, above all, comprehensive recitals of the simon-pure, the subordinate, facts, and the evidence thereof. If Congress had intended that we be governed by your recommendations, it would have said so, in which case our role, if any, would have been that of a rubber stamp. Clearly, your recommendations, highly valued as they are, stand as advisory only. When you remark that the hearing officer has an opportunity to

appraise the registrant by seeing and hearing him—an opportunity which we do not have (but which is also enjoyed by the local boards)—, you are citing the traditional reason why appellate courts are loathe to question the subordinate facts (as distinguished from conclusions) found by the trier. I do not undervalue that principle. Still, all appellate tribunals must adjudicate and, in this respect, they particularly insist on being provided with a full recital of the pertinent, subordinate facts. Our function is exclusively judicial and, above all, this means that, *first*, we must decide what the subordinate, or basic, facts are and, *second*, apply the law to those facts.

In the second paragraph of your letter you seem to feel I was wondering why you made no recommendation in reference to the ministerial claim. My point, rather, was that the ministerial issue was never before the hearing officer nor you; nor could it have been under the law. As for our minutes, in the Forcellina case, they recited, without variance from the practice we invariably had followed, that the cover sheet was transmitted to the district attorney here in pursuance of Section 6(j) of the Selective Service Act of 1948. This was on SSS Form #100. The transmittal would not have been made, could not properly have been made, except as the conscientious objection issue was ripe for investigation and report by your Department; and the minute was necessarily an affirmation of that fact. In addition, as said, a covering letter specifically mentioned denial of the IV-D claim. Had it been in the file, as it should have been, no conceivable doubt could have arisen.

Yours very truly,
Wallace W. Brown, Chairman
APPEAL BOARD FOR THE
STATE OF CONNECTICUT

WWB:ec

Appendix B

(Editorial, New York *Herald Tribune*, March 23, 1953, p. 18.)

THE F.B.I. FILES

One of the critical points in the uproar which Messrs. McCarthy and McCarran have raised over the confirmation of Charles E. Bohlen as Ambassador to Moscow is the safeguarding of the Federal Bureau of Investigation files. Secretary of State Dulles gave the substance of the file on Mr. Bohlen to an executive session of the Senate Foreign Relations Committee; but he did not disclose names and sources of the material, explaining that "the President and the Attorney General closely restrict access" to the files themselves.

As Mr. Dulles pointed out, F.B.I. field checks produce "a tremendous mass of reports of interviews with all sorts and varieties of people of undetermined reliability." The persons interviewed are not under oath; they believe that they are speaking in confidence and are free from any rules of evidence such as those which ban mere opinions or hearsay. Much of what they relate may be erroneous, even if supplied in good faith, and the opportunities for prejudice or malice to color the accounts are obvious. All, however, is grist for the field check, to be winnowed and refined by further study. "The investigators' job," to quote Mr. Dulles, "is to find information that is adverse, because it is their business to try to detect anything that is suspicious." When the reports are summarized by the F.B.I. the derogatory material stands out—to emphasize the "danger signals."

This summary, however, is not an evaluation of the worth of the material; that is left to responsible departmental officers. The F.B.I. agents are detectives, not judges. If their reports were made public, either in "raw" form or in summary, they would convey an impression that was not intended. Moreover, the whole technique of field checks

would be jeopardized if the interviews were not kept confidential; those interviewed would become much more cautious and valuable leads would be lost. Even if Congressional committees in executive session had access to the files, there would almost certainly be leaks—indeed, Senator McCarthy's claims to unauthorized knowledge of the files has doubtless already created a real handicap for the F.B.I. What is needed now is not more publicity for F.B.I. material but greater safeguards for information essential to national security. In the wrong hands or too widely disseminated, such information could do irreparable damage to individuals and to the whole F.B.I. procedure.

(Article, *New York Herald Tribune*, March 23, 1953, p. 15.)

MATTER OF FACT

By Joseph and Stewart Alsop

Jenkins' Ear

WASHINGTON

Around the State Department, Charles E. Bohlen is currently called "Jenkins' ear." It may seem an odd name for President Eisenhower's recently nominated Ambassador to Moscow, but the historical allusion is apt all the same.

Jenkins was the British sea captain whose pickled ear brought on a war between England and Spain. The international situation was pretty tense, anyway, when the Spanish government, having captured Jenkins and his ship, cropped his ear as punishment for alleged free-booting in Spanish waters. Jenkins saved the ear, salted it and brought it back to London. There it was shown in the House of Commons as evidence of the evil deeds of Spain. . . .

The case also raises, in acute form, at least two major

issues. It is understood on the highest authority that the most important evidence allegedly damaging to Bohlen takes the form of anonymous letters. One question, therefore, is whether the poison pen is to reign supreme among us, with Sen. McCarthy in the role of king-maker. The other question, of course, is whether President Eisenhower is to be master in his own house, or must yield to the McCarthyite Republican wing.

"Target for tonight, John Foster Dulles; target for tomorrow, Dwight D. Eisenhower," is the way one shrewd Capitol Hill observer has summed up the McCarthy operational plan. Dulles has been driven to fight back already. The signs are that the President is getting ready to fight back too.

(Article, New York Times, March 24, 1953, p. 15.)

MAIN ISSUE IN BOHLEN CASE WHO MAY SEE F.B.I. FILES?

*Capital is Fearful Lest Precedent Be Set and
Others Win Access to 'Gossip'*

By James Reston

SPECIAL TO THE NEW YORK TIMES

Washington, March 23—The main issue in the "Bohlen case," now before the Senate, is no longer what happens to the career or reputation of Charles E. Bohlen, President Eisenhower's nominee to be Ambassador to the Soviet Union, but what happens to the confidential files of the Federal Bureau of Investigation. . . .

Mr. Taft spoke out strongly against allowing the full Senate, or even the entire Foreign Relations Committee, to see the F.B.I. report. Such files, he observed, contain all

kinds of gossip and unsubstantiated charges that could not be regarded as dependable "evidence". To disclose them to any large number of Senators, he said, could seriously damage a man's reputation and "destroy the F.B.I." ...

For example, the raw files in the F.B.I. contain every imaginable type of information, including anonymous letters, gossip, hearsay and unsubstantiated rumors of every description. Accordingly, officials were asking here tonight:

What would happen if material of this sort fell into the hands of Senator McCarthy; Senator William E. Jenner, chairman of the Judiciary subcommittee investigating communism in the universities; Representative Harold H. Velde, chairman of the House Un-American Activities Committee, which is inquiring into the same question, and Senator McCarran, the ranking Democratic member of the Judiciary Committee.

(Article, New York Times, editorial section, Sunday, March 29, 1953.)

F.B.I. FILES HOLD FACTS AND SOME FIGMENTS, TOO.

*Investigators Record Everything and Leave the
Evaluation to Others*

By Luther A. Huston

SPECIAL TO THE NEW YORK TIMES

Washington, March 28—Washington has been unusually conscious of the F.B.I. and its records this week because of two matters that have been of concern to the Senate and to a House Judiciary subcommittee. The first was the nomination of Charles E. Bohlen to be Ambassador to the Soviet Union. The second was an inquiry into the loyalty of Ameri-

cans employed by the Secretariat of the United Nations.

In the case of Mr. Bohlen the records of the F.B.I. were brought forth to prove to the satisfaction of all but a bitter minority of the Senate that his loyalty and integrity were unimpeachable. He won confirmation. . . .

One result was to focus attention upon the F.B.I. files and revive interest in what goes into them.

The first thing the F.B.I. does on any individual, either in cases involving loyalty and security or in those of applications for positions with the Federal Government, is to make what is known as a "name-check." That means that it looks in its files to find out if it has any reports on a person of that name.

New names are constantly being added to the files and new information about the persons involved.

The F.B.I. reads every issue of *The Daily Worker*, and other publications regarded as being communistic or having communistic leanings. If a man's name appears in any of these publications as a speaker at a Communist meeting, as the signer of a petition to aid a Communist who is in trouble, as a contributor to Communist funds, or as a participant in any Communist-inspired activity or enterprise, his name and the pertinent data go in the F.B.I. indices. . . .

The F.B.I. receives many letters, some of them signed and some anonymous, pertaining to individuals whose names may be in the files or who the writers of the letters think should be investigated. Some are sober, serious letters; some are obviously epistles written out of pure vindictiveness or by crackpots. . . .

An early step, if a full investigation were called for, would be to check a man's military record, if he had one. His employment record also would be checked, and his credit standing as indicated by records of responsible credit agencies.

A check would be made to determine his political affiliation and voting record. If he were a Republican or a Demo-

crat the files would merely carry a notation that he was registered as a voter of a major party. If he registered as a member of the American Labor party, the party affiliation would be noted by name.

In every community in which a man or woman had ever lived, police records would be checked to learn if they had ever been arrested, what for, and what disposition had been made of their cases.

F.B.I. agents would also go into communities in which a man had lived and ask about him of his neighbors and associates. They would seek to find out what sort of people he associated with, whether he had any bad habits, was emotionally unstable, or was in any way a "questionable" character. . . .

There is no precise definition of what constitutes "derogatory information". Membership in the Communist party or in a Communist front, would be considered "derogatory information" in a loyalty case. So would subscribing to The Daily Worker, contributing to Communist party or Communist front funds, signing a petition for a Communist or a Communist cause, or associating with known Communists or other subversives. . . .

The reports on these checks and inquiries all go into the "raw files" of the F.B.I. as they come from the investigators. Since they are often conducted in various areas and by a number of individuals there may be eight or ten separate reports in the files. . . .

The favorable information about Mr. Bohlen was summarized, however, according to Secretary Dulles, Senators Taft and Sparkman and the F.B.I. All derogatory information was transmitted to Secretary Dulles in full. The detailed derogatory information took up more space in the thirty-page report than the summarized favorable information.

No evaluation by the F.B.I. of either the good or the bad in the report accompanied its transmittal to Mr. Dulles.

It is the ironclad practice of the F.B.I. never to evaluate any of the information it receives from its own investigators or any other source. The head of the agency to which it is transmitted must be the sole judge of the value and relative significance of all the information the F.B.I. gives him.

Rigid adherence to this practice also was testified to at the House subcommittee hearing on United Nations employees.

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HAROLD S. WILLEY, Clerk.

Supreme Court of the United States

OCTOBER TERM, 1952

No. 573

UNITED STATES OF AMERICA, PETITIONER,

vs.

LESTER PACKER, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

HERMAN ADLERSTEIN

HAYDEN C. COVINGTON

Counsel for Respondent

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SUPREME COURT OF THE UNITED STATES

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals [49-51]¹ is not yet reported. The trial court made no findings of fact or conclusions of law. [46]

Jurisdiction

The judgment of the Court of Appeals was entered December 31, 1952. [51] The petition for writ of certiorari

¹ Figures appearing herein within brackets refer to pages of the printed Transcript of Record.

was filed January 29, 1953. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

Question Presented

Whether Section 6 (j) of the Selective Service Act of 1948, providing for investigation and appropriate inquiry, the Selective Service Regulations and the due-process clause of the Fifth Amendment required the hearing officer of the Department of Justice, upon the hearing of respondent's claim for classification as a conscientious objector, to make available to him, at or before the hearing, the secret police report concerning his conduct as a conscientious objector, and whether the use of secret evidence without divulging it to respondent in making the recommendation against his claim to the appeal board deprives respondent of his rights guaranteed by the act, the regulations and the Constitution.

Statement

In September of 1948 respondent registered with Selective Service Local Board No. 22, the Bronx, New York. A classification questionnaire was mailed to respondent, July 19, 1949. [13] It was returned by him on August 29, 1949. [13] The questionnaire showed his name and address. [53] It showed he had no previous military service. [54] It showed that he had never been married. [55] He worked at the millinery manufacturing concern of Glarys & Belle Inc. as a purchaser of supplies. [55] He showed that he had completed seven years of elementary schooling, three years of junior high school and was graduated from high school. In addition to this he showed that he had attended the City College of New York, taking a course of study in merchandising. [57] He is a United

States citizen, having been born at New York on April 4, 1929. [57]

Respondent failed to sign Series XIV of the questionnaire requesting the local board to send him a conscientious objector form. [13-14, 58]

On September 28, 1949, respondent was placed in Class I-A by his local board. [59] He neither appealed nor requested a personal appearance within the ten-day time limit fixed by the regulations. No further action was taken in his case by the local board until September 27, 1950, when he was ordered to report for a physical examination on October 4, 1950. He reported and was found physically acceptable. [14, 15, 59]

Sixteen days later the local board mailed him notice of classification (SSS Form No. 110); a card containing the usual notice. [14] On that same day, October 20, 1950, respondent requested a conscientious objector form. [15, 61] On October 23, 1950, the conscientious objector form was mailed to the registrant. [15, 59] On October 31, 1950, respondent returned the conscientious objector form properly filled out. [15, 59, 62-70]

He signed Series I (B) certifying that by reason of religious training and belief he was conscientiously opposed to participation in war in any form and that he objected to combatant and noncombatant military service. [62] He showed that he believed in a Supreme Being. [62, 64] He referred to his belief as a "code of morals" that may "very well stem from this Supreme Being". [64] He showed that his religious training in early years included a study and belief of the "ten commandments and religious prayer". [64] He stated that his belief he inherited as a part of his nature and stated that "it is a part of this Super Natural force". [65]

Respondent explained fully the nature of his beliefs, showing that they are based on the Bible. [66-68] He did, however, also cite incidentally a Chinese philosopher on human nature, stating that human nature was inherently

good and that if it remained good men would do no evil. He stated that the Chinese philosopher said "if men become evil it is not the fault of their original endowment". [65]

He further stated that "no man has the right to take the life of another human being regardless of circumstances. We are put on the earth by the will of God and by the will of God shall we depart". [68]

Respondent also gave references. He stated that he had never been a member of a military organization. He added that he was not a member "of a religious sect or organization". [69-70]

Two days after the conscientious objector form was received on November 2, 1950, the local board ordered that there would be no reopening of Packer's case. [15-16, 71] On November 7, 1950, Packer wrote a letter requesting a personal appearance or hearing out of time, in which letter he stated that he would welcome an F.B.I. investigation on his conscientious objector claim. [16, 71] The local board, on November 16, 1950, denied the request for hearing. [16, 72] The next day the local board ordered respondent to report for induction on December 5, 1950. [16-17, 59]

On November 22, 1950, Col. Cobb, New York City Director of Selective Service, called in Packer's file for review. [59] The City Director, on November 24, 1950, notified the local board that the mailing of the conscientious objector form to Packer and his returning it to the board should have reopened his case. The City Director informed the local board that they should have reclassified him and mailed him a new notice (SSS Form No. 110). The City Director, with a view to preserving the rights of respondent, ordered the local board to send the file to the appeal board. [17-18, 72-73] The local board ordered the induction of Packer postponed on December 5, 1950. [18, 59, 73]

On December 6, 1950, the local board and the appeal agent reviewed respondent's file. [18, 59] The next day the

file was sent to the appeal board. [18, 59] The appeal board on receipt of the file and review of it preliminarily denied the claim and referred the file to the Department of Justice for an appropriate inquiry and hearing on the conscientious objector claim. [18, 59, 74]

Four months later, on April 9, 1951, following the secret investigation conducted by the F.B.I., Packer was notified to appear before the hearing officer for an inquiry as to his conscientious objections. On April 9, 1951, respondent, on receipt of the notice and accompanying instructions, wrote the hearing officer a letter requesting to be provided with any unfavorable evidence. [18, 74-75] (The notice that the hearing officer mailed to the respondent invited him to request the hearing officer to provide the nature and character of any unfavorable evidence.) The hearing officer replied that he found no unfavorable evidence in the secret investigative report of the F.B.I. [43]

Respondent appeared before the hearing officer on May 7, 1951, the date fixed for the hearing. [40] The stenographic report made of the hearing showed that he informed the hearing officer that he went to a religious school until he was thirteen. Then he received his confirmation or his Bar Mitzvah. [44] He described his beliefs as the results of the Hebrew instruction received, that all humans are naturally good and that God is not only external but is also internal. [44] He stated that it is something "I have slowly developed within myself" and that it was basic in him. [45] As to his particular objections to participation in war he stated that he relied upon the commandment to love his neighbor and that he believed the commandment, "Thou shalt not kill." [45]

Respondent also informed the hearing officer that he would be willing, as a conscientious objector, to "assist in any welfare organization that the Government might establish, any humanitarian organization, rehabilitation work". He said: "I would be willing to give any service in anything that will be creative but not destructive." [46]

The hearing officer asked him if he would be willing to participate in noncombatant service in the army. He stated that he would not. [46]

The hearing officer inquired of Packer why it was that he did not certify that he was a conscientious objector in his questionnaire and waited a year to request the conscientious objector form. [45] He stated that at the time he filed the questionnaire he intended to claim the conscientious objector status. He added that his friends advised him that he might not pass his physical examination and that if he made a conscientious objector claim he would be looking for trouble from the board. He stated: "Not knowing the procedure of a conscientious objector and not realizing that my rights would expire after a certain time, I took this advice." [45]

The hearing officer stated that, since the board had allowed him to make his claim, "that part of it is all right." [45] The hearing officer received from Packer verification of his conscientious objector status signed by two witnesses. [19, 46] Upon receipt of these he said: "There is nothing derogatory to you, Mr. Packer, in the FBI report; there is nothing you have to meet, employment record is favorable and your friends and neighbors seem to confirm your attitude." [46]

The report of the hearing officer to the Department of Justice found that respondent believed in a Supreme Being and that he had been trained in the "Decalogue and religious prayer as well as moral training from his parents". [40] He reviewed the report of the F.B.I. briefly. [40, 41] He referred to the written statement produced by respondent supporting his conscientious objection at the hearing. [41] He referred to respondent's religious schooling and quoted respondent as saying: "I had never really gone along with the ritual of my religion." [41] He referred to the description by respondent of his religious views supporting conscientious objection. [41-42] He repeated the

explanation given by respondent of his delay in demanding the conscientious objector form. [42]

The hearing officer concluded that the Jewish religion was "not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form". [42]

He then added that he gave "no significance or weight to the fact that no statement of conscientious objection was made" in the questionnaire. The hearing officer said finally that respondent failed to establish that his objection "arises from religious training and belief". [42] He recommended that Packer be denied the conscientious objector claim and be placed in Class I-A. [42]

The Deputy Attorney General, on review of the draft board file, the secret F.B.I. report and the report of the hearing officer, recommended to the appeal board that respondent's claim as a conscientious objector be rejected because his beliefs "are based upon philosophical or sociological grounds or upon a person[al] moral code". [75] He added that he concurred in the recommendation of the hearing officer. [75]

On August 20, 1951, respondent was placed in Class I-A. [20, 76] He was notified of this classification on August 24, 1951. [21] An order to report for induction on September 14, 1951, was issued on August 30, 1951. [21] On that date respondent wrote a letter to General Hershey requesting a review of his file and an appeal to the President. [21, 76-78] On September 6, 1951, the local board wrote respondent that on August 30, 1951, they had reviewed his file again and again refused to reopen his case. [21, 78]

The City Director of New York, on September 6, 1951, wrote Packer that he refused to appeal the case to the President. [21, 79] On this same day the National Director, General Hershey, called the file in for review. [22, 80-81] Pending this review respondent was informed not to report for induction. [22] On September 14, 1951, his induction was postponed to October 16, 1951. [22] On October 2, 1951,

the National Director notified Packer that no action would be taken on his request for an appeal to the President. [82-83] On October 16, 1951, he reported for, but refused to submit to, induction, signing a statement certifying to his refusal. [23]

On November 19, 1951, by indictment in one count, he was charged with refusing to submit to induction. [1-2] Following a subpoena duces tecum issued by the respondent and he also made a motion to inspect the F.B.I. report. [2, 3-5] The Government moved to quash the subpoena duces tecum. [5-7] Respondent opposed the motion. [7-9] The motion to quash the subpoena was granted. [10] An order was made denying respondent the right to inspect the F.B.I. report before trial. [9]

Respondent waived the right of trial by jury. [10-11] Evidence was received. [10-34] Respondent was sentenced to the custody of the Attorney General for a period of four years. [39] Judgment and commitment was entered. [46] Respondent appealed. [47] The Court of Appeals reversed the conviction because of the failure to produce the F.B.I. report and make it a part of the administrative proceedings. [49] The judgment was reversed. [51] Petition for writ of certiorari in this Court was timely filed.

Argument

Respondent adopts the argument appearing in the Brief for Respondent in Opposition in No. 540, October Term, 1952, *United States v. Nugent*, the companion case to this case. That argument is made a part hereof by reference as though printed at length herein.—See pages 6-12 of that brief.

The Government emphasizes the point (on page 3 of the petition for writ of certiorari) that respondent failed to sign the blank in Series XIV of the classification questionnaire, requesting the board to mail him a special form for conscientious objector. It is stated that respondent did not

request the special form until October 20, 1950. (See page 3 of the petition.) To begin with, no weight ought to be given to this contention because it was argued in the Court of Appeals that respondent waived the claim because of these facts. This argument was rejected by the court below. [50-51] The Government has not assigned this holding as error: It has not presented this as one of its questions presented. The holding is binding on the Government and in the law of this case as far as that point is concerned. The holding of the court below on this point was in accordance with the administrative interpretation placed upon the regulations by the New York City Director. [17-18, 72-73]

Local Board Memorandum No. 41, issued by National Headquarters, Selective Service System, Washington, D. C., dated November 30, 1951, as amended August 15, 1952, in paragraph 2 states that "a registrant should be considered to have claimed conscientious objection to war if he has signed Series XIV of the classification questionnaire . . . , or if he has filed any other written statement claiming that he is a conscientious objector".

A holding similar to the holding of the court below on this point was made on June 26, 1952, by the United States District Court for the Western District of Pennsylvania. —See *United States v. Clark*, 105 F. Supp. 613.

The Government takes the position that the failure to produce the F.B.I. report either at or before the hearing and make it a part of the administrative papers in the case is harmless error because there was nothing in the secret investigative report of the F.B.I. that was adverse or unfavorable to respondent.

To this contention there are two answers. One is that reached by the court below, that it was for the respondent to determine whether there was anything unfavorable in the F.B.I. report. He should have judged for himself by reading the report. The court held that since he did not

have an opportunity to see and study it he could not perform that important function.

This Court must not assume that the F.B.I. report was favorable without seeing it. It is for the courts to determine after reading the report whether the contentions of the hearing officer were correct. The recommendation of the Deputy Attorney General indicates that the F.B.I. report must have been unfavorable or at least the report must have stated that respondent's belief was based on philosophical or sociological grounds. The report must have indicated that respondent based his conscientious objections on a personal moral code and not on his belief in a Supreme Being.

The hearing officer concluded that the respondent was not a conscientious objector because the Hebrew faith does not have, as a part of its belief, conscientious objections to war. [42] This conclusion was arbitrary and capricious. It is similar to that reached by another hearing officer, that a Catholic could not be a conscientious objector because the Catholic Church had no claim of pacifism. This conclusion was held to be arbitrary and capricious.—See *United States v. Everngam*, 102 F. Supp. 128 (D. C. W. Va. 1951).

An effort was made by respondent to offer evidence from a Jewish rabbi that the Hebrew faith makes room for conscientious objection to war. This testimony was excluded as immaterial.

The Deputy Attorney General, although concurring in the arbitrary and capricious recommendation of the hearing officer, concluded that respondent's belief was based on philosophical or sociological grounds and upon a personal moral code and ought, therefore, to be rejected, there being no support for a conclusion that respondent's belief was based on the Bible or belief in the Supreme Being. [75] The conclusion that the belief was philosophical or sociological or purely a personal moral code is without basis in fact. It flies in the teeth of all of the evidence given by the respondent, whose integrity and credibility were not im-

peached. It must, therefore, be assumed that the Deputy Attorney General relied upon the F.B.I. report to reach his conclusions. The use of and reliance upon the report without producing it and making it a part of the file so that respondent could read it harmed and injured respondent.

Let it be assumed, for the purpose of argument, that there is no unfavorable evidence in the F.B.I. report. The respondent is, nevertheless, harmed.

The failure to produce the F.B.I. report and make it a part of the administrative proceedings is itself a violation of the act and the regulations. The act and the regulations contemplate that facts discovered on the F.B.I. investigation shall be placed in the file. Without referring to the F.B.I. reports the Selective Service Regulations require that all facts and papers relating to a registrant's case should be included in the registrant's file.—See 32 C. F. R. §§ 1621.8, 1623.1 and 1623.24.

A report resulting from an investigation by the Department of Justice into the "character and good faith of the conscientious objections of the registrant" (32 C. F. R. § 1626.25 (c)) most certainly pertains to the registrant. This report also pertains to the registrant because it is used by the hearing officer to determine his recommendation of classification of the registrant.

Since the F.B.I. report should have been put into the registrant's cover sheet, it was subject to his inspection under the regulation that allows a registrant to see all papers in his file (32 C. F. R. § 1606.32 (a)), which reads, in part: "(a) Information contained in records in a registrant's file may be disclosed or furnished to, or examined by, the following persons, namely: (1) the registrant . . ."

The above regulation proves that the Selective Service System sees the intent of Congress to give a full and fair hearing.

Since the report of the F.B.I. was beneficial to respondent, it must be concluded that the evidence in the

report made by the Department of Justice was favorable to respondent's claim. The act and the regulations do not intend that the Department of Justice has the right to withhold from the administrative agency evidence developed by the investigation conducted by the F.B.I. Why would Congress provide for the uncovering of the facts and then permit the facts to be withheld from the administrative agency? The very asking of the question demands the plain answer that the evidence must be produced to the administrative agency by the Department of Justice. It is unreasonable to suppose that Congress intended to permit the investigation to be conducted and then have the facts hid from the administrative agency. Congress intended that the Department of Justice should serve and help the administrative agency to be fully informed under the act.

The fact that the evidence was favorable to respondent does not excuse the withholding of it from the appeal board. It was the obligation of the appeal board to make a fair and just determination. Respondent also has some rights along with the appeal board under the act. Congress intended that he should be fairly and justly classified. If there was evidence favorable or unfavorable to him, it was the duty of the Department of Justice to supply it to the administrative agency. It was for the appeal board to finally determine the claim. The appeal board could not fairly and justly classify respondent without having the benefit of the investigation conducted by the F.B.I.

If it is erroneous to withhold *unfavorable* evidence from the registrant, then it is all the more wrong for the Department of Justice to hold back *favorable* evidence from the appeal board. The purpose of Congress will be defeated if all or any of the facts of the investigation are withheld from the appeal board. No complaint whatever could be made about outside evidence not being placed in the file if it were not for the fact that Congress provided for the investigation and inquiry by the F.B.I. Since Con-

gress hired the Department of Justice to work for the appeal board in producing all of the facts on the conscientious objector claim, then it is the unequivocal duty of the Department of Justice to complete the job and deliver the goods, the report of the F.B.I.

The fact that respondent has the burden of sustaining his claim does not in any way excuse the Department of Justice from doing its job. If Congress intended to excuse the Department of Justice from investigating and conducting an appropriate inquiry solely because the conscientious objector had the burden of sustaining his claim, then Congress would have said so. It is the appeal board that was entitled to the information withheld from it. The withholding of the F.B.I. report harmed the appeal board. The harm suffered by the appeal board, in turn, injured respondent.

The rights of the registrant, incidental to the appropriate inquiry by the Department of Justice under the act, are not confined to seeing and answering *unfavorable* evidence. Since the act provided that the Department of Justice should turn up all of the facts to the appeal board, whether they were favorable or unfavorable, it was necessary that the report be made a part of the file.)

Unless and until the report was put in the file, the procedure contemplated by Congress was not completed. Under the act and regulations respondent was entitled to have all of the favorable evidence placed in the file, as much as the respondent would have the right to be confronted with and answer any unfavorable evidence. The record was not complete since the Department of Justice deliberately tore out of the record a great part of the case. It was a gaping hole that vitiated the entire administrative process.

Respondent subpoenaed the F.B.I. report at the trial. The subpoena was quashed. The motion to inspect was denied. The Government must bear the responsibility for failing to produce material evidence. Failure to allow the courts to make use of the F.B.I. report in determining the

questions here presented gives rise to a presumption against the Government on its contentions.—See *United States v. Nugent*, 200 F. 2d 46 (2d Cir.).

The case here is similar to that of *United States v. Clare*, 108 F. Supp. 307 (S. D. N. Y. November 5, 1952) where (at the end of the opinion) the court held that the withholding of the F.B.I. report warranted the conclusion that the denial of the conscientious objector status was without basis in fact.

Conclusion

While the question presented is of national importance sufficient to warrant a decision by this Court, it is so obvious that the judgment of the court below is plainly right that, it is respectfully submitted, the petition for writ of certiorari should be denied.

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